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# **IDAHO CODE**

CONTAINING THE

## **GENERAL LAWS OF IDAHO**

### **ANNOTATED**

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ORIGINALLY PUBLISHED BY AUTHORITY OF  
LAWS 1947, CHAPTER 224

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LAWS 1949, CHAPTER 167 AS AMENDED

Compiled Under the Supervision of the  
Idaho Code Commission

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COMMISSIONERS

MAX M. SHEILS, JR.  
EXECUTIVE SECRETARY

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**TITLES 68-73**

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## PUBLISHER'S NOTE

Since the publication in 1999 of former Volume 11A, Titles 68 to 73, many laws have been amended or repealed and many new laws have been enacted. The resulting increase in the size of the cumulative supplement for the former volume has made it necessary to revise this volume. Accordingly, Replacement Titles 68 to 73 are issued with the approval and under the direction of the Idaho Code Commission.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, court decisions are now being read as they are released by the courts. A consequence of this more current reading of cases, as they are posted on *lexis.com*, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Idaho Supreme Court and the Court of Appeals, and the appropriate federal courts, posted on *lexis.com* as of April 11, 2006. These cases will be printed in the following reports:

### Idaho Reports

Pacific Reporter, 3rd Series

Federal Supplement, 2nd Series

Federal Reporter, 3rd Series

United States Supreme Court Reports, Lawyers' Edition, 2nd Series

Following is an explanation of the abbreviations of the Court Rules used throughout the Idaho Code.

I.R.C.P.	Idaho Rules of Civil Procedure
I.R.E.	Idaho Rules of Evidence
I.C.R.	Idaho Criminal Rules
M.C.R.	Misdemeanor Criminal Rules
I.I.R.	Idaho Infraction Rules
I.J.R.	Idaho Juvenile Rules
I.C.A.R.	Idaho Court Administrative Rules
I.A.R.	Idaho Appellate Rules

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## USER'S GUIDE

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To assist the legal profession and the layperson in obtaining the maximum benefit from the Idaho Code, a User's Guide has been included in the first volume of this set.





## ADJOURNMENT DATES OF SESSIONS OF LEGISLATURE

Article 3, § 22 of the Idaho State Constitution provides: "No act shall take effect until sixty days from the end of the session at which the same shall have been passed, except in case of emergency, which emergency shall be declared in the preamble or in the body of the law."

Section 67-510 Idaho Code provides: "No act shall take effect until July 1 of the year of the regular session or sixty (60) days from the end of the session at which the same shall have been passed, whichever date occurs last, except in case of emergency, which emergency shall be declared in the preamble or body of the law."

Every joint resolution, unless a different time is prescribed therein, takes effect from its passage."

This table is given in order that the effective date of acts, not carrying an emergency or which do not specify an effective date, may be determined with a minimum of delay.

Year	Adjournment Date
1921 .....	March 5, 1921
1923 .....	March 9, 1923
1925 .....	March 5, 1925
1927 .....	March 3, 1927
1929 .....	March 7, 1929
1931 .....	March 5, 1931
1931 (E.S.) .....	March 13, 1931
1933 .....	March 1, 1933
1933 (E.S.) .....	June 22, 1933
1935 .....	March 8, 1935
1935 (1st E.S.) .....	March 20, 1935
1935 (2nd E.S.) .....	July 10, 1935
1935 (3rd E.S.) .....	July 31, 1936
1937 .....	March 6, 1937
1937 (E.S.) .....	November 30, 1938
1939 .....	March 2, 1939
1941 .....	March 8, 1941
1943 .....	February 28, 1943
1944 (1st E.S.) .....	March 1, 1944
1944 (2nd E.S.) .....	March 4, 1944
1945 .....	March 9, 1945
1946 (1st E.S.) .....	March 7, 1946
1947 .....	March 7, 1947
1949 .....	March 4, 1949
1950 (E.S.) .....	February 25, 1950
1951 .....	March 12, 1951
1952 (E.S.) .....	January 16, 1952

1953 .....	March 6, 1953
1955 .....	March 5, 1955
1957 .....	March 16, 1957
1959 .....	March 9, 1959
1961 .....	March 2, 1961
1961 (1st E.S.) .....	August 4, 1961
1963 .....	March 19, 1963
1964 (E.S.) .....	August 1, 1964
1965 .....	March 18, 1965
1965 (1st E.S.) .....	March 25, 1965
1966 (2nd E.S.) .....	March 5, 1966
1966 (3rd E.S.) .....	March 17, 1966
1967 .....	March 31, 1967
1967 (1st E.S.) .....	June 23, 1967
1968 (2nd E.S.) .....	February 9, 1968
1969 .....	March 27, 1969
1970 .....	March 7, 1970
1971 .....	March 19, 1971
1971 (E.S.) .....	April 8, 1971
1972 .....	March 25, 1972
1973 .....	March 13, 1973
1974 .....	March 30, 1974
1975 .....	March 22, 1975
1976 .....	March 19, 1976
1977 .....	March 21, 1977
1978 .....	March 18, 1978
1979 .....	March 26, 1979
1980 .....	March 31, 1980
1981 .....	March 27, 1981
1981 (E.S.) .....	July 21, 1981
1982 .....	March 24, 1982
1983 .....	April 14, 1983
1983 (E.S.) .....	May 11, 1983
1984 .....	March 31, 1984
1985 .....	March 13, 1985
1986 .....	March 28, 1986
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1996 .....	March 15, 1996
1997 .....	March 19, 1997

1998 .....	March 23, 1998
1999 .....	March 19, 1999
2000 .....	April 5, 2000
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**68-101. Trustees — Power of district court to appoint.** — When a trust exists without any appointed trustees or where any or all of the trustees renounce, die, or are discharged, the district court of the county where the trust property or some portion thereof is situated, must appoint another trustee to direct the execution of the trust. The court may, in its discretion, appoint the original number or any less number of trustees. [1919, ch. 19, § 1, p. 82; C.S., § 6417; I.C.A., § 66-101.]

## STATUTORY NOTES

**Cross References.** — Escrows, § 26-1301 et seq.; § 30-901 et seq.

Jurisdiction of courts concerning trusts, §§ 15-7-201 — 15-7-206.

Registration of trusts, § 15-7-101.

Trust administration, §§ 15-7-101 — 15-7-401.

## JUDICIAL DECISIONS

**Authority of Original Trustees.**

Where deed makes no provision for appointment of successors of original trustees, there is no authority vested in original trustees to

fill vacancies, but same should be appointed by district court. *Sherman v. Citizens' Right of Way Co.*, 37 Idaho 528, 217 P. 985 (1923).

## RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, §§ 51, 205 et seq.

**68-102. Death, renunciation, or discharge of trustee — Survival of trust.** — On the death, renunciation, or discharge of one (1) of the several number of trustees, the trust survives to the others. [1919, ch. 19, § 2, p. 82; C.S., § 6418; I.C.A., § 66-102.]

**68-103. Compensation of trustees.** — When a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified and no more. [1919, ch. 19, § 3, p. 82; C.S., § 6419; I.C.A., § 66-103.]

## STATUTORY NOTES

**Cross References.** — Compensation of trustees under will, § 15-7-205.

## JUDICIAL DECISIONS

**Cited in:** *Bannock Title Co. v. Lindsey*, 86 Idaho 583, 388 P.2d 1011 (1963).

## RESEARCH REFERENCES

**A.L.R.** — Limiting effect of provision in contract, will or trust instrument fixing trustee's or executor's fees. 19 A.L.R.3d 520.

Amount of attorneys' compensation in matters involving guardianship and trusts. 57 A.L.R.3d 550.

Resignation or removal of executor, administrator, guardian, or trustee, before final administration or before termination of trust, as affecting his compensation. 96 A.L.R.3d 1102.

**68-104. Uniform Trustees' Powers Act — Definitions.** — As used in this act:

(1) "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal



beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interests, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration;

(2) "Trustee" means an original, added, or successor trustee;

(3) "Prudent man" means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, diligence, discretion, and judgment would act in the management of their own affairs. [1965, ch. 95, § 1, p. 173.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S. L. 1965, ch. 95, compiled as §§ 68-104 — 68-113.

**68-105. Powers of trustee conferred by trust or by law.** — (a) The trustee has all powers conferred upon him by the provisions of this act unless limited in the trust instrument.

(b) An instrument which is not a trust under section 68-104(1) may incorporate any part of this act by reference. [1965, ch. 95, § 2, p. 173.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-104.

**68-106. Powers of trustees conferred by this act.** — (a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

(b) In the exercise of his powers including the powers granted by this act, a trustee has a duty to act with due regard to his obligation as a fiduciary.

(c) A trustee has the power, subject to subsections (a) and (b):

(1) to collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(2) to receive additions to the assets of the trust;

(3) to continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

- (4) to acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;
- (5) to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;
- (6) to deposit trust funds in a bank, including a bank operated by the trustee;
- (7) to acquire assets, including real estate, in the name of the trust, and to sell, convey or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;
- (8) to make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;
- (9) to subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;
- (10) to enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;
- (11) to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
- (12) to grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;
- (13) to vote a security, in person or by general or limited proxy;
- (14) to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;
- (15) to sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (16) to hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;
- (17) to insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;
- (18) to borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;
- (19) to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in

part, any claim belonging to the trust to the extent that the claim is uncollectible;

(20) to pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(21) to allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) to pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(23) to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(24) to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(25) to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(26) to execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee. [1965, ch. 95, § 3, p. 173; am. 1983, ch. 137, § 1, p. 333.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-104.

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.

Attorney fees and costs on appeal.

### Applicability.

Where the issues and claims of this suit did not involve the administration or defense of the estate or the trustee in the performance of his duties as trustee, subdivisions (c)(24) and (c)(25) of this section were inapplicable. *Grover v. Grover*, 109 Idaho 687, 710 P.2d 597 (1985).

### Attorney Fees and Costs on Appeal.

Where both a widow and her deceased husband's son, as co-trustees, had pursued litigation

with the belief that each was defending either the trust or the estate, and both had acted within their prescribed roles as trustees protecting and defending actions and claims, attorney fees and costs on appeal were awarded to both to be charged against the principal of the estate. *Carter v. Carter* (In re Trust of Carter), — Idaho —, — P.3d —, 2006 Ida. LEXIS 23 (Feb. 23, 2006).

**Cited in:** *Taylor v. Maile*, — Idaho —, 127 P.3d 156 (2005).



## RESEARCH REFERENCES

**A.L.R.** — Allocation, as between income and principal, of income on property used in paying legacies, debts and expenses. 2 A.L.R.3d 1061.

Distribution of income released by declaration of invalidity of express direction of accumulation. 17 A.L.R.3d 231.

Trustee's power to exchange trust property for share of corporation organized to hold the property. 20 A.L.R.3d 841.

Power of trustee of noncharitable trust to make gift of trust property. 21 A.L.R.3d 801.

Duty of trustee to diversify investments,

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Validity and construction of trust provision authorizing trustee to purchase trust property. 39 A.L.R.3d 836.

Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support. 41 A.L.R.3d 255.

Standard of care required of trustee representing itself to have expert knowledge or skill. 91 A.L.R.3d 903.

**68-107. Trustee's office not transferable — Transactions under chapter 14, title 26, Idaho Code, excepted.** — (1) The trustee shall not transfer his office to another or delegate the entire administration of the trust to a co-trustee or another.

(2) Subsection (1) of this section does not apply to any transfer permitted under chapter 14, title 26, Idaho Code. [1965, ch. 95, § 4, p. 173; am. 1991, ch. 215, § 1, p. 515.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1991, ch. 215 declared an emergency. Approved April 2, 1991.

**68-108. Power of court to permit deviation or to approve transactions involving conflict of interest.** — (a) This act does not effect [affect] the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this act.

(b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization, except as provided in sections 68-106(c)(1), (4), (6), (18), and (24) upon petition of the trustee. Under this section, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to any corporate trustee. [1965, ch. 95, § 5, p. 173.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "affect" in subsection (a) was inserted by the compiler.

For words "this act" see Compiler's notes, § 68-104.

## JUDICIAL DECISIONS

**Cited in:** Taylor v. Maile, — Idaho —, 127 P.3d 156 (2005).

## RESEARCH REFERENCES

**A.L.R.** — Power of court to authorize modification of trust instrument because of changes in tax law. 57 A.L.R.3d 1044.

Court's power to appoint additional trustees over number specified in trust instrument. 59 A.L.R.3d 1129.

**68-109. Powers exercisable by joint trustees — Liability. —**

(a) Any power vested in 3 or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of the joinder.

(b) If 2 or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

(c) This section does not excuse a co-trustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust. [1965, ch. 95, § 6, p. 173.]

## JUDICIAL DECISIONS

**Signature Requirement.**

Where trust agreement required signatures of trustee and co-trustee to join in any sale or exchange of trust property, as only trustee signed "land for debt contract" and warranty deed, there was no factual dispute precluding

court's grant of summary judgment on rescission of the "land for debt" contract. *Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 916 P.2d 1264 (1996).

**68-110. Third persons protected in dealing with trustee. —** With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee. [1965, ch. 95, § 7, p. 173.]

**68-111. Application of act. —** Except as specifically provided in the trust, the provisions of this act apply to any trust established after the effective date [May 17, 1965] of this act. [1965, ch. 95, § 8, p. 173.]

## STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's notes, § 68-104.

**68-112. Uniformity of interpretation.** — This act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it. [1965, ch. 95, § 9, p. 173.]

## STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's notes, § 68-104.

**68-113. Short title.** — This act may be cited as the “Uniform Trustees’ Powers Act.” [1965, ch. 95, § 10, p. 173.]

## STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's notes, § 68-104.

Section 11 of S.L. 1965, ch. 95, read: “Severability. — If any provision of this act or the application thereof to any person or cir-

cumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.”

**68-114. Presentation of a certification of trust in lieu of the trust instrument — Effect — Form.** — (1) A trustee may present a certification of trust to any person in lieu of a copy of any trust instrument to establish the existence or terms of the trust. The trustee may present the certification voluntarily or at the request of the person with whom he is dealing. Notwithstanding any provision of this chapter to the contrary, no person is required to accept and rely solely on a certification of trust in lieu of a copy of, or excerpts from, the trust instrument itself.

(2) Such a certification must be in the form of an affidavit signed and acknowledged by all of the currently acting trustees of the trust. [I.C., § 68-114, as added by 1998, ch. 302, § 1, p. 995.]

**68-115. Contents of certification of trust.** — (1) A certification of trust may confirm the following facts or contain the following information:

- (a) The existence of the trust and date of execution of any trust instrument;
- (b) The identity of the settlor and each currently acting trustee;
- (c) The powers of the trustee and any restrictions imposed upon him in dealing with assets of the trust;
- (d) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke it;
- (e) If there is more than one (1) trustee, whether all of the currently acting trustees must, or less than all may, act to exercise identified powers of the trustee;
- (f) The identifying number of the trust and whether it is a social security number or an employer identification number;



(g) The state or other jurisdiction under the laws of which the trust was established; and

(h) The form in which title to assets of the trust is to be taken.

(2) The certification must contain a statement that the trust has not been revoked or amended to make any representations contained in the certification incorrect, and that the signatures are those of all the currently acting trustees. [I.C., § 68-115, as added by 1998, ch. 302, § 2, p. 995.]

**68-116. Dispositive provisions not required — Person presented with certification may request excerpts from trust instrument designating trustee.** — A certification of trust need not contain the dispositive provisions of the trust, but the person to whom the certification is presented may require copies of excerpts from any trust instrument which designate the trustee or confer upon him the power to act in the pending transaction. [I.C., § 68-116, as added by 1998, ch. 302, § 3, p. 995.]

**68-117. Reliance on facts contained in certification — Enforceability.** — (1) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting. A person who does not know that the facts contained in the certification are incorrect may assume without inquiry the existence of the facts contained in the certification. Knowledge may not be inferred solely from the fact that a copy of all or part of a trust instrument is held by the person relying upon the certification.

(2) A transaction, and any lien created thereby, entered into by a trustee and a person acting in reliance upon a certification of trust is fully enforceable against the assets of the trust unless the person knows that the trustee is acting outside the scope of the trust. [I.C., § 68-117, as added by 1998, ch. 302, § 4, p. 995.]

**68-118. Failure to demand certification or refusal to accept and rely on certification not improper act — Liability.** — A person's failure to demand a certification of trust, or his refusal to accept and rely solely on a certification of trust, may not be considered to be an improper act by him and no inference as to whether he has acted in good faith may be drawn from the failure to demand, or the refusal to accept and rely upon, a certification of trust. This section creates no implication that a person is liable for acting in reliance upon a certification of trust under circumstances where the requirements of sections 68-114 through 68-119, Idaho Code, are not satisfied. [I.C., § 68-118, as added by 1998, ch. 302, § 5, p. 995.]

**68-119. Applicability.** — The provisions of sections 68-114 through 68-120, Idaho Code, shall apply to all trusts, whether established pursuant to Idaho law or established pursuant to the law of another state or jurisdiction. [I.C., § 68-119, as added by 1998, ch. 302, § 6, p. 995; am. 2006, ch. 250, § 1, p. 759.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 250, updated the last reference in the section span.

**68-120. Doctrine of worthier title inapplicable.** — The doctrine of worthier title shall not be applied as a rule of law or as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's heirs, heirs at law, next of kin, distributees, relatives or family, or language of similar import, shall not create or presumptively create a reversionary interest in the transferor. [I.C., § 68-120, as added by 2006, ch. 250, § 2, p. 759.]

## CHAPTER 2

### ASSIGNMENTS FOR BENEFIT OF CREDITORS

#### SECTION.

68-201. Residence qualification of assignee.

**68-201. Residence qualification of assignee.** — No assignment for the benefit of creditors shall be valid unless made to a bona fide resident of this state or to a corporation duly authorized to do business in this state. [1927, ch. 209, § 1, p. 293; I.C.A., § 66-201.]

### RESEARCH REFERENCES

**A.L.R.** — Debtor's transfer of assets to representative of creditors as effectuating release of unsecured claims, in absence of express agreement to that effect. 8 A.L.R.3d 903.

## CHAPTER 3

### UNIFORM FIDUCIARIES LAW

#### SECTION.

68-301. Definition of terms.  
 68-302. Application of payments made to fiduciaries.  
 68-303. [Repealed.]  
 68-304. Transfer of negotiable instrument by fiduciary.  
 68-305. Check drawn by fiduciary payable to third person.  
 68-306. Check drawn by and payable to fiduciary.  
 68-307. Deposit in name of fiduciary as such.

#### SECTION.

68-308. Deposit in name of principal.  
 68-309. Deposit in fiduciary's personal account.  
 68-310. Deposit in names of two or more trustees.  
 68-311. Chapter not retroactive.  
 68-312. Cases not provided for in chapter.  
 68-313. Uniformity of interpretation.  
 68-314. Short title.  
 68-315. Inconsistent laws repealed.

**68-301. Definition of terms.** — In this chapter unless the context or subject-matter otherwise requires:

1. "Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator,



curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

“Person” includes a corporation, partnership, or other association, or two (2) or more persons having a joint or common interest.

“Principal” includes any person to whom a fiduciary as such owes an obligation.

2. A thing is done “in good faith” within the meaning of this chapter when it is in fact done honestly, whether it be done negligently or not. [1925, ch. 217, § 1, p. 393; I.C.A., § 66-301.]

#### STATUTORY NOTES

**Cross References.** — Declaration of Jurisdiction of court, §§ 15-7-201 — 15-7-206.  
rights, administration of trusts, § 10-1204.

**68-302. Application of payments made to fiduciaries.** — A person who in good faith pays or transfers to a fiduciary any money or other property which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. [1925, ch. 217, § 2, p. 393; I.C.A., § 66-302.]

**68-303. Registration of transfer of securities held by fiduciaries.**  
[Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which I.C.A., § 66-303, was repealed by S.L. 1959, comprised S.L. 1925, ch. 217, § 3, p. 393; ch. 136, § 12, p. 294.

**68-304. Transfer of negotiable instrument by fiduciary.** — If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by the fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument. [1925, ch. 217, § 4, p. 393; I.C.A., § 66-304.]

## RESEARCH REFERENCES

**A.L.R.** — Indorsement of negotiable instrument by writing not on instrument itself. 19 A.L.R.3d 1297.

Construction and effect of UCC Art. 3, dealing with commercial paper. 23 A.L.R.3d 932; 42 A.L.R.5th 137.

Duty of pledgee of commercial paper as to its enforcement of collection. 45 A.L.R.3d 248.

Account stated based upon check or note tendered in payment of debt. 46 A.L.R.3d 1325.

What amounts to "negligence contributing to alteration or unauthorized signature" under UCC § 3-406. 67 A.L.R.3d 144.

What constitutes "dealing" under UCC § 3-305(2), providing that holder in due course takes instrument free from all defenses of any party to instrument with whom holder has not dealt. 42 A.L.R.5th 137.

**68-305. Check drawn by fiduciary payable to third person.** — If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument. [1925, ch. 217, § 5, p. 393; I.C.A., § 66-305.]

**68-306. Check drawn by and payable to fiduciary.** — If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such facts that his action in taking the instrument amounts to bad faith. [1925, ch. 217, § 6, p. 393; I.C.A., § 66-303.]

## JUDICIAL DECISIONS

**Liability of Depository Bank.**

Mere switching of trust funds by fiduciary to his own personal account does not impose

on depository bank any duty of investigation. *White-Dulany Co. v. Craigmont State Bank*, 48 Idaho 100, 279 P. 621 (1929).

**68-307. Deposit in name of fiduciary as such.** — If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. [1925, ch. 217, § 7, p. 393; I.C.A., § 66-307.]

**68-308. Deposit in name of principal.** — If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. [1925, ch. 217, § 8, p. 393; I.C.A., § 66-308.]

**68-309. Deposit in fiduciary's personal account.** — If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of the checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligations as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. [1925, ch. 217, § 9, p. 393; I.C.A., § 66-309.]

## JUDICIAL DECISIONS

### ANALYSIS

Indorsement.  
Viability of section.



**Indorsement.**

If agent were authorized to indorse principal's checks only restrictively for deposit in the principal's account at principal's bank, bank in which agent's personal account was located would have been obligated to inquire as to whether he was committing a breach of his fiduciary obligation by depositing the checks in agent's personal account. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

The fact that agent had indorsed in blank checks payable to principal, when depositing them in the principal's bank account did not indicate what form of indorsement was necessary to allow him to carry out his express authority in said account. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

Despite a bank's contention that §§ 26-717, 28-4-401, 68-309, taken together dictated that only the owner of a bank account may assert a legally cognizable interest in a deposit account, the statutes did not resolve the rights of the account owner in relation to the bank-

ruptcy debtor, the true owner of the funds deposited in that account; thus the use of account funds to pay a debt of the account owner was a transfer of the debtor's property which was avoidable in bankruptcy. *Hopkins v. D.L. Evans Bank (In re Fox Bean Co.)*, 287 Bankr. 270 (Bankr. D. Idaho 2002).

**Viability of Section.**

Because of the substantial similarity of the language in § 68-306 and this section, the statement made in the comment to the official text of the portion of the UCC enacted as § 28-3-304(2) that refers to § 6 of the Uniform Fiduciaries Act (namely, that this subsection follows the policy of § 6 and specifies the same elements as notice of improper conduct of a fiduciary) should also be considered to include reference to § 9 of that act, which is this section; thus, there was no inconsistency between § 28-3-304(2) and this section, as applied to the facts of this case, and the implications of this conclusion are that § 28-3-304(2) did not repeal this section. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990).

**68-310. Deposit in names of two or more trustees.** — When a deposit is made in a bank in the name of two (2) or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith. [1925, ch. 217, § 10, p. 393; I.C.A., § 66-310.]

**68-311. Chapter not retroactive.** — The provisions of this chapter shall not apply to transactions taking place prior to the time when it takes effect. [1925, ch. 217, § 11, p. 393; I.C.A., § 66-311.]

**68-312. Cases not provided for in chapter.** — In any case not provided for in this chapter the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. [1925, ch. 217, § 12, p. 393; I.C.A., § 66-312.]

**68-313. Uniformity of interpretation.** — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1925, ch. 217, § 13, p. 393; I.C.A., § 66-313.]

**68-314. Short title.** — This chapter may be cited as the Uniform Fiduciaries Law. [1925, ch. 217, § 14, p. 393; I.C.A., § 66-314.]

**68-315. Inconsistent laws repealed.** — All acts or parts of acts inconsistent with this chapter are hereby repealed. [1925, ch. 217, § 15, p. 393; I.C.A., § 66-315.]

## CHAPTER 4

### LEGAL INVESTMENTS

#### SECTION.

- 68-401. Mortgage loans insurable by federal housing administrator — Authority to make.  
 68-402. Securities of federal housing administrator and national mortgage associations legal investments.  
 68-403. Other laws declared inapplicable.  
 68-404. Federal Home Loan Bank securities made legal investments.

#### SECTION.

- 68-404A. Banks and trust companies — Investment in mutual funds.  
 68-405. Housing bonds legal investments.  
 68-406. Life, endowment and annuity contracts — Investment of funds.  
 68-407. Public and trust funds — Investment in port district obligations.

**68-401. Mortgage loans insurable by federal housing administrator — Authority to make.** — The following persons, corporations, institutions and officers are hereby authorized to make such loans, secured by real property or leasehold as the federal housing administrator insures or makes a commitment to insure, and may obtain such insurance, to-wit: banks, trust companies, insurance companies, loan and building corporations, building and loan associations, savings and loan associations, and other savings and/or investment institutions, guardians, executors, administrators, trustees and other fiduciaries, and all other persons, associations and corporations subject to the laws of this state and qualified and licensed to make such loans. [1935, ch. 3, § 1, p. 14; am. 1935, ch. 127, § 1, p. 299; am. 1937, ch. 26, § 1, p. 36.]

### STATUTORY NOTES

**Cross References.** — Banks, legal investments, § 26-601.

Insurance companies, §§ 41-602 — 41-605.

### RESEARCH REFERENCES

**A.L.R.** — Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust. 69 A.L.R.3d 774.

**68-402. Securities of federal housing administrator and national mortgage associations legal investments.** — It shall be lawful for banks, trust companies, insurance companies, loan and building corporations, building and loan associations, savings and loan associations, and other savings and/or investment institutions, guardians, executors, administrators, trustees and other fiduciaries, and all other persons, associations and corporations subject to the laws of this state, qualified thereto, to invest their funds and the moneys in their custody or possession eligible for investment in notes or bonds secured by mortgage or deed of trust insured or debentures issued, by the federal housing administrator, and in securities

and stocks of national mortgage associations. [1935, ch. 3, § 2, p. 14; am. 1935, ch. 127, § 2, p. 299; am. 1937, ch. 26, § 2, p. 36; am. 1957, ch. 108, § 1, p. 186.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1957, ch. 108 declared an emergency. Approved February 28, 1957.

**68-403. Other laws declared inapplicable.** — No law of this state, requiring securities upon which loans or investments may be made or prescribing the nature, amount or form of such security, or prescribing or limiting the period for which loans or investments may be made, shall be deemed to apply to loans or investments made pursuant to the authority granted in this act. [1935, ch. 3, § 3, p. 14; reen. 1935, ch. 127, § 3, p. 299.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1935, ch. 3 as amended, which is compiled as §§ 68-401 — 68-403.

ch. 3 declared an emergency. Approved January 23, 1935.

**Effective Dates.** — Section 4 of S.L. 1935,

Section 4 of S.L. 1935, ch. 127 declared an emergency. Approved March 19, 1935.

**68-404. Federal Home Loan Bank securities made legal investments.** — Executors, administrators, guardians, trustees and other fiduciaries of every kind and nature, land and building corporations, building and loan associations, savings and loan associations and other savings or investment institutions, trust companies, banks and insurance companies, incorporated under the laws of this state, are authorized, in addition to investments now authorized by laws of this state, to invest in bonds and other obligations of, or guaranteed as to interest and principal by, the United States, either directly or through securities of or other interests in any unincorporated investment company or investment trust registered under the federal investment company act of 1940, as from time to time amended, provided that the portfolio of such investment company or investment trust is limited to obligations of the United States government and its agencies and instrumentalities, the payment of which is fully guaranteed as to principal and interest by the United States government, and to repurchase agreements fully collateralized by any such obligations, provided that such investment company or investment trust takes delivery of such collateral either directly or through an authorized custodian; bonds or debentures issued by any federal home loan bank in accordance with the provisions of the Federal Home Loan Bank Act, and amendments thereto; consolidated federal home loan bank bonds or debentures issued by the federal home loan bank board in accordance with the provisions of the Federal Home Loan Bank Act, and amendments thereto; bonds or debentures issued by the Federal Savings and Loan Insurance Corporation in accordance with the provisions of title IV of the National Housing Act, and amendments thereto; shares or accounts of land and building corporations, savings and loan associations, building and loan associations, and other



savings or investment institutions, incorporated under the laws of this state, which have been insured by the Federal Savings and Loan Insurance Corporation; and shares or accounts of federal savings and loan associations incorporated under the provisions of Home Owners' Loan Act of 1933, and amendments thereto, doing business in this state, which have been insured by the Federal Savings and Loan Insurance Corporation. [1937, ch. 62, § 1, p. 83; am. 1992, ch. 239, § 1, p. 711.]

#### STATUTORY NOTES

**Federal References.** — The Federal Home Loan Bank Act, referred to, is compiled as 12 U.S.C. § 1421 et seq.; Title 4 of the National Housing Act, was compiled as 12 U.S.C. §§ 1724-1730, but was repealed by P.L. 101-73, Act of August 9, 1989; and the

Home Owners' Loan Act of 1933, is compiled as 12 U.S.C. § 1461 et seq.

The federal investment company act of 1940, referred to herein, is compiled as 15 U.S.C. § 80a-1 et seq.

**68-404A. Banks and trust companies — Investment in mutual funds.** — (1) In addition to other investments authorized by law for the investment of funds held by a fiduciary, or by the instrument governing the fiduciary relationship, and notwithstanding any other provision of law, a bank or trust company acting as a fiduciary, agent or otherwise may, in the exercise of its investment discretion or at the direction of another person authorized to direct the investment of funds held by the bank or trust company as a fiduciary, invest and reinvest in the securities of an open-end or closed-end management investment company or investment trust registered under the federal investment company act of 1940.

(2) The fact that the bank or trust company or an affiliate of the bank or trust company provides services to the investment company or investment trust as an investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or otherwise and is receiving reasonable remuneration for those services, shall not preclude such bank or trust company from investing or reinvesting in the securities of such investment company or investment trust. [I.C., § 68-404A, as added by 1992, ch. 54, § 1, p. 159.]

#### STATUTORY NOTES

**Federal References.** — The federal investment company act of 1940, referred to

herein, is compiled as 15 U.S.C. § 80a-1 et seq.

**68-405. Housing bonds legal investments.** — Notwithstanding any restrictions on investments contained in any laws of this state all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds or other obligations issued by a housing authority pursuant to the Housing Authorities Law of this state, or issued by any public housing authority or agency in the United

States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof; it being the purpose of this act to authorize any private persons or corporations to use any funds owned or controlled by them, including (but not limited to) sinking, insurance, investment and trust funds, and funds held on deposit, for the purchase of any such bonds or other obligations; provided, however, that nothing contained in this act shall be construed as relieving any person, firm or corporation from any duty of exercising reasonable care in selecting securities. [1939, ch. 232, § 1, p. 528.]

### STATUTORY NOTES

**Legislative Intent.** — Section 2 of S.L. 1939, ch. 232, provided as follows: "Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this act or the application thereof to any person or circumstance, is held invalid, the remainder of the act and the application of such provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby."

**Compiler's Notes.** — The words "this act"

refer to S.L. 1939, ch. 232, which is compiled as this section.

The words enclosed in parentheses so appeared in the law as enacted.

Section 3 of S.L. 1939, ch. 232 provided as follows: "Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling."

**Effective Dates.** — Section 4 of S.L. 1939, ch. 232 declared an emergency. Approved March 10, 1939.

**68-406. Life, endowment and annuity contracts — Investment of funds.** — All guardians, trustees and other fiduciaries may legally invest any funds administered by them in any life, endowment or annuity contracts issued by any legal reserve life insurance company authorized to do business in the state of Idaho, it being the purpose of this act to authorize any private person, bank, trust company or other institution acting as guardian, trustee or fiduciary to invest funds coming into their possession or under their control as such guardian, trustee or fiduciary in any life, endowment, or annuity contracts issued by any legal reserve insurance company authorized to do business in the state of Idaho, when, in their opinion, it will be for the best interests of their wards or trust estate, provided, however, that whenever an order of the probate court or other court has been heretofore required by law for the investment of any funds being administered by such guardian, trustee or other fiduciary, then such order shall be required in cases of investment of funds under this act. [1947, ch. 206, § 1, p. 482.]

### STATUTORY NOTES

**Legislative Intent.** — Section 2 of S.L. 1947, ch. 206, provided as follows: "Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this act, or the application thereof to any person or circumstance, is held invalid, the remainder of the act and the application of

such provision to person or circumstances other than those as to which it is held invalid, shall not be affected thereby."

**Compiler's Notes.** — The words "this act" refer to S.L. 1947, ch. 206, which is compiled as this section.

Section 3 of S.L. 1947, ch. 206, provided as follows: "Insofar as the provisions of this act



are inconsistent with the provisions of any other law, the provisions of this act shall be controlling."

**68-407. Public and trust funds — Investment in port district obligations.** — Notwithstanding the provisions of the Public Depository Law, or of any other statute of the state of Idaho to the contrary, it shall be lawful for the state of Idaho and any of its departments, institutions and agencies, municipalities, districts and political subdivisions, and for any political or public corporation of the state, and for any insurance company, savings and loan association, and for any bank, trust company or other financial institution operating under the laws of the state of Idaho, and for any executor, administrator, guardian or conservator, trustee or other fiduciary, to invest its funds or the moneys in its custody or possession eligible for investment, in any revenue bonds or warrants or general obligation bonds or general obligation refunding bonds issued by any port district of the state of Idaho. [I.C., § 68-407, as added by S.L. 1967, ch. 325, § 1, p. 954.]

#### STATUTORY NOTES

**Cross References.** — Banks as depositories, §§ 67-2725 — 67-2739, 67-2741 — 67-2743, 67-2744 — 67-2747.

**Compiler's Notes.** — The Public Deposi-

tory Law is compiled as § 57-101 et seq.

**Effective Dates.** — Section 2 of S.L. 1967, ch. 325 declared an emergency. Approved April 10, 1967.

### CHAPTER 5

#### UNIFORM PRUDENT INVESTOR ACT

##### SECTION.

- 68-501. Prudent investor rule.
- 68-502. Standard of care — Portfolio strategy  
— Risk and return objectives.
- 68-503. Diversification.
- 68-504. Duties at inception of trusteeship.
- 68-505. Loyalty.
- 68-506. Impartiality.
- 68-507. Investment costs.
- 68-508. Reviewing compliance.

##### SECTION.

- 68-509. Delegation of investment and management functions.
- 68-510. Language invoking standard of act.
- 68-511. Application to existing trusts.
- 68-512. Uniformity of application and construction.
- 68-513. Short title.
- 68-514. Guardians.

**68-501. Prudent investor rule.** — (1) Except as otherwise provided in subsection (2) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this act.

(2) The prudent investor rule, a default rule, may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust. [I.C. § 68-501, as added by S.L. 1997, ch. 14, § 2, p. 14.]

### STATUTORY NOTES

**Prior Laws.** — Former §§ 68-501 — 68-505, which comprised 1949, ch. 36 §§ 1 — 5, p. 59, were repealed by S.L. 1997, ch. 14, § 1, effective July 1, 1997.

**Compiler's Notes.** — Following §§ 68-501—68-514, Uniform Prudent Investor Act, appear "Comments" which are the comments prepared by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association February 14, 1995. They are reprinted with the permission of the National Conference of Commissioners on Uniform State Laws.

In some instances the subsection, subdivision and other designations in the Idaho version of a section of the Idaho Uniform Prudent Investor Act are different than those of the official version. For instance § 68-502 con-

tains subsections (1) through (6) with subsection (3) containing subdivisions (a) through (h). The official version of this section 2 contains subsections (a) through (f) with subsection (c) containing subdivisions (1) through (8). Therefore a reference in the comments to (c) (4) would be a reference to subsection (3) (d) in the Idaho version.

The Idaho Legislature in adopting the Uniform Prudent Investor Act did not adopt § 14 — Severability, or § 15 — Effective Date. Section 68-914, Idaho Code is not contained in the Uniform Prudent Investor Act as adopted by the National Conference of Commissioners on Uniform State Laws.

The words "this act" refer to S.L. 1997, ch. 14, compiled as §§ 27-408, 50-1013A, 59-1312, and 68-501 — 68-514.

### RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trust, § 476 et seq.

**C.J.S.** — 80 C.J.S., Trusts, §§ 323, 482.

### Official Comment

This section imposes the obligation of prudence in the conduct of investment functions and identifies further sections of the Act that specify the attributes of prudent conduct.

**Origins.** The prudence standard for trust investing traces back to *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446 (1830). Trustees should "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." *Id.* at 461.

**Prior legislation.** The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the Amory case. See Mayo A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 Ohio State L.J. 491, at 501 (1951); for the text of the model act, which inspired many state statutes, see *id.* at 508-09. Another prominent codification of the Amory standard is Uniform Probate Code § 7-302 (1969), which provides that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . ."

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act

(ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims . . ."

**Prior Restatement.** The Restatement of Trusts 2d (1959) also tracked the language of the Amory case: "In making investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived . . ." Restatement of Trusts 2d § 227 (1959).

**Objective standard.** The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the "reasonable person" rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 2 through 9 of this Act identify the main factors that bear on prudent investment behavior.

**Variation.** Almost all of the rules of trust law are default rules, that is, rules that the

settlor may alter or abrogate. Subsection (b) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its

performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

**68-502. Standard of care — Portfolio strategy — Risk and return objectives.** — (1) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

(2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(3) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

- (a) General economic conditions;
- (b) The possible effect of inflation or deflation;
- (c) The expected tax consequences of investment decisions or strategies;
- (d) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
- (e) The expected total return from income and the appreciation of capital;
- (f) Other resources of the beneficiaries;
- (g) Needs for liquidity, regularity of income and preservation or appreciation of capital; and
- (h) An asset's special relationship or special value, if any, to the purposes of the trust or to one (1) or more of the beneficiaries.

(4) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(5) A trustee may invest in any kind of property or type of investment consistent with the standards of this act.

(6) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise. [I.C. § 68-502, as added by S.L. 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-502 was repealed. See Prior Laws, § 68-501.

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-501.

#### Official Comment

Section 2 is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a

(1992). Subsection (f) is derived from Uniform Probate Code § 7-302 (1969).

**Objective standard.** Subsection (a) of this Act carries forward the relational and objective standard made familiar in the Amory



case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

**Portfolio standard.** Subsection (b) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term "portfolio" embraces the entire trust estate.

**Risk and return.** Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. See generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

Subsection (b) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

**Factors affecting investment.** Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. See generally Robert H. Jeffrey & Robert D. Arnott, *Is Your Alpha Big Enough to Cover Its Taxes?*, *Journal of Portfolio Management* 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee's duty of impartiality requires attention to the competing interests of each of them.

Subsection (c)(8), allowing the trustee to take into account any preferences of the beneficiaries respecting heirlooms or other prized assets, derives from the Illinois act, 760 ILCS § 5/5(a)(4) (1992).

**Duty to monitor.** Subsections (a) through (d) apply both to investing and managing trust assets. "Managing" embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments.

**Duty to investigate.** Subsection (d) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment — for example, audit reports or records of title. E.g., *Estate of Collins*, 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

**Abrogating categoric restrictions.** Subsection 2(e) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categoric exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so-called "legal lists" of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility — in this case, inflation risk — that had not been anticipated. Accordingly, section 2(e) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: "Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust's portfolio." Re-

statement of Trusts 3d: Prudent Investor Rule § 227, Comment f, at 24 (1992). The premise of subsection 2(e) is that trust beneficiaries are better protected by the Act's emphasis on close attention to risk/return objectives as prescribed in subsection 2(b) than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding "speculative" or "risky" investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee's task to invest at a risk level that is suitable to the purposes of the trust.

The abolition of categoric restrictions against types of investment in no way alters the trustee's conventional duty of loyalty, which is reiterated for the purposes of this Act in Section 5. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee's breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

**Professional fiduciaries.** The distinction taken in subsection (f) between amateur and professional trustees is familiar law. The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Restatement of Trusts 2d § 174 (1959) provides: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and

if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. See Annot., *Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill*, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48-49.

The Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 3) in the case of smaller trusts. The Committee believes that subsections (b) and (c) of the Act emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 1(b) of the Act to reduce the trustee's standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments h, m, at 28, 51; reporter's note to Comment g, id. at 83.

**Matters of proof.** Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor's intent. See Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

**68-503. Diversification.** — A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. [I.C., § 68-503, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-503 was repealed. See Prior Laws, § 68-510.

#### Official Comment

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for

pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. See



Annot., *Duty of Trustee to Diversify Investments, and Liability for Failure to Do So*, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in Section 3 of this Act, is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

**Rationale for diversification.** "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, *An Introduction to Modern Financial Theory* 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk — the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently — to include investments in different industries. This is uncompensated risk — nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. "As

long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings." R.A. Brealey, *An Introduction to Risk and Return from Common Stocks* 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: "Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries . . . . Broader diversification is usually to be preferred in trust investing," and pooled investment vehicles "make thorough diversification practical for most trustees." Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments e-h, at 77 (1992). See also Macey, *supra*, at 23-24; Brealey, *supra*, at 111-13.

**Diversifying by pooling.** It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 share) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to the UCTFA explains: "The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble." 7 Uniform Laws Ann. 402 (1985).

Fiduciary investing in mutual funds. Trusts can also achieve diversification by investing in mutual funds. See Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment m, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities "issued by an investment company registered under the Investment Company Act of 1940 . . . ."



**68-504. Duties at inception of trusteeship.** — Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this act. [I.C., § 68-504, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-504 was repealed. See Prior Laws, § 68-501.

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-501.

#### Official Comment

Section 4, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that "[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too

long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year." Restatement of Trusts 2d § 230, comment b (1959). The 1992 Restatement retreated from this rule of thumb, saying, "No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities." Restatement of Trusts 3d: Prudent Investor Rule § 229, comment b (1992).

The criteria and circumstances identified in Section 2 of this Act as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

**68-505. Loyalty.** — A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries. [I.C., § 68-505, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-505 was repealed. See Prior Laws, § 68-501.

#### Official Comment

The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries, as opposed to acting for the trustee's own interest or that of third parties. The language of Section 4 of this Act derives from Restatement of Trusts 3d: Prudent Investor Rule § 170 (1992), which makes minute changes in Restatement of Trusts 2d § 170 (1959).

The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), ex-

tracted in the Comment to Section 1 of this Act, effectively merges the requirements of prudence and loyalty. A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries.

The duty of loyalty is not limited to settings entailing self-dealing or conflict of interest in which the trustee would benefit personally from the trust. "The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the

purpose of benefitting the third person rather than the trust." Restatement of Trusts 2d § 170, comment q, at 371 (1959).

No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries — for example, by accepting below-market returns — in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. See, e.g., John H. Langbein & Richard Posner, *Social Investing and the Law of Trusts*, 79 Michigan L. Rev. 72, 96-97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?*, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They

argue instead that particular schemes of social investing may not result in below-market returns. See, e.g., Marcia O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 American U.L. Rev. 1 (1992). In 1994 the Department of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA §§ 403-404. Interpretive Bulletin 94-1, 59 Fed. Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94-1. The Bulletin reminds fiduciary investors that they are prohibited from "subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives."

**68-506. Impartiality.** — If a trust has two (2) or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries. [I.C., § 68-506, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-506, which comprised I.C., § 68-506, as added by 1963, ch. 303, § -1, p.793, am. 1965, ch. 11, § 1, p.

20, was repealed by S.L. 1997, ch. 14, § 1, effective July 1, 1997.

#### Official Comment

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.

The language of Section 6 derives from Restatement of Trusts 2d § 183 (1959); see also id., § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and

remainder interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

The trustee's duty of impartiality commonly affects the conduct of investment and management functions in the sphere of principal and income allocations. This Act prescribes no regime for allocating receipts and expenses. The details of such allocations are commonly handled under specialized legislation, such as the Revised Uniform Principal and Income Act (1962) (which is presently under study by the Uniform Law Commission with a view toward further revision).

**68-507. Investment costs.** — In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee. [I.C., § 68-507, as added by 1997, ch. 14, § 2, p. 14.]

#### Official Comment

Wasting beneficiaries' money is imprudent. In devising and implementing strategies for

the investment and management of trust assets, trustees are obliged to minimize costs.

The language of Section 7 derives from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special at-

tention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment m, at 58 (1992).

**68-508. Reviewing compliance.** — Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight. [I.C., § 68-508, as added by 1997, ch. 14, § 2, p. 14.]

#### Official Comment

This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment b, at 11 (1992). Trustees are not insurers. Not every invest-

ment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is *ex ante*, not *ex post*.

**68-509. Delegation of investment and management functions.** —

(1) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in:

- (a) Selecting an agent;
- (b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (c) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(3) A trustee who complies with the requirements of subsection (1) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(4) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of the state of Idaho, an agent submits to the jurisdiction of the courts of this state. [I.C., § 68-509, as added by 1997, ch. 14, § 2, p. 14.]

#### RESEARCH REFERENCES

**A.L.R.** — When is attorney, accountant, or other professional service provider fiduciary within meaning of § 3(21)(A)(i) or (iii) or Employee Retirement Income Security Act (29 U.S.C.A. § 1002(21)(A)(i) or (iii)). 166 A.L.R. Fed. 595.

When is bank or other financial institution fiduciary within meaning of § 3(21)(A)(i) or (iii) of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1002(21)(A)(i) or (iii)). 166 A.L.R. Fed. 671.



### Official Comment

This section of the Act reverses the much-criticized rule that forbade trustees to delegate investment and management functions. The language of this section is derived from Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992), discussed *infra*, and from the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

**Former law.** The former nondelegation rule survived into the 1959 Restatement: "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." The rule put a premium on the frequently arbitrary task of distinguishing discretionary functions that were thought to be nondelegable from supposedly ministerial functions that the trustee was allowed to delegate. Restatement of Trusts 2d § 171 (1959).

The Restatement of Trusts 2d admitted in a comment that "There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate." Instead, the comment directed attention to a list of factors that "may be of importance: (1) the amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself." Restatement of Trusts 2d § 171, comment d (1959). The 1959 Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment h (1959).

For discussion and criticism of the former rule see William L. Cary & Craig B. Bright, *The Delegation of Investment Responsibility for Endowment Funds*, 74 Columbia L. Rev. 207 (1974); John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 American Bar Foundation Research J. 1, 18-24.

**The modern trend to favor delegation.** The trend of subsequent legislation, culminating in the Restatement of Trusts 3d: Prudent Investor Rule, has been strongly hostile to the nondelegation rule. See John H. Langbein, *Reversing the Nondelegation Rule of Trust-Investment Law*, 59 Missouri L. Rev. 105 (1994).

**The delegation rule of the Uniform Trustee Powers Act.** The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It authorizes trustees "to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise

or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary . . ." Uniform Trustee Powers Act § 3(24), 7B Uniform Laws Ann. 743 (1985). The Act has been enacted in 16 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

**UMIFA's delegation rule.** The Uniform Management of Institutional Funds Act (1972) (UMIFA), authorizes the governing boards of eleemosynary institutions, who are trustee-like fiduciaries, to delegate investment matters either to a committee of the board or to outside investment advisors, investment counsel, managers, banks, or trust companies. UMIFA § 5, 7A Uniform Laws Ann. 705 (1985). UMIFA has been enacted in 38 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1993).

**ERISA's delegation rule.** The Employee Retirement Income Security Act of 1974, the federal statute that prescribes fiduciary standards for investing the assets of pension and employee benefit plans, allows a pension or employee benefit plan to provide that "authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers . . ." ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). Commentators have explained the rationale for ERISA's encouragement of delegation:

ERISA . . . invites the dissolution of unitary trusteeship. . . . ERISA's fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans — computing and honoring benefit entitlements across decades of employment and retirement — is also a complex business. . . . Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan administration firm, or an insurance company may oversee the design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest



plans spread their pension investments among dozens of money management firms).

John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 496 (1990).

**The delegation rule of the 1992 Restatement.** The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1959), extracted *supra*, and replaces it with substitute text that reads:

§ 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992). The 1992 Restatement integrates this delegation standard into the prudent investor rule of section 227, providing that “the trustee must . . . act with prudence in deciding whether and how to delegate to others . . .” Restatement of Trusts 3d: Prudent Investor Rule § 227(c) (1992).

**Protecting the beneficiary against unreasonable delegation.** There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. A broad set of trustees’ powers, such as those found in most lawyer-drafted instruments and exemplified in the Uniform Trustees’ Powers Act, permits the trustee to act vigorously and expeditiously to maximize the interests of the beneficiaries in a variety of transactions and administrative settings. Trust law relies upon the duties of loyalty and prudent administration, and upon procedural safeguards such as periodic accounting and the availability of judicial oversight, to prevent the misuse of these powers. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent’s specialized investment skills or whatever other attributes induced the trustee

to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

Section 9 of the Uniform Prudent Investor Act is designed to strike the appropriate balance between the advantages and the hazards of delegation. Section 9 authorizes delegation under the limitations of subsections (a) and (b). Section 9(a) imposes duties of care, skill, and caution on the trustee in selecting the agent, in establishing the terms of the delegation, and in reviewing the agent’s compliance.

The trustee’s duties of care, skill, and caution in framing the terms of the delegation should protect the beneficiary against overbroad delegation. For example, a trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement. Leaving one’s beneficiaries remediless against willful wrongdoing is inconsistent with the duty to use care and caution in formulating the terms of the delegation. This sense that it is imprudent to expose beneficiaries to broad exculpation clauses underlies both federal and state legislation restricting exculpation clauses, e.g., ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a); New York Est. Powers Trusts Law § 11-1.7 (McKinney 1967).

Although subsection (c) of the Act exonerates the trustee from personal responsibility for the agent’s conduct when the delegation satisfies the standards of subsection 9(a), subsection 9(b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation.

**Costs.** The duty to minimize costs that is articulated in Section 7 of this Act applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from “double dipping.” If, for example, the trustee’s regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

**68-510. Language invoking standard of act.** — The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this act: “investments permissible by law for investment of trust funds,” “legal investments,” “authorized investments,” “using the judgment and care

under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital,” “prudent man rule,” “prudent trustee rule,” “prudent person rule” and “prudent investor rule.” [I.C., § 68-510, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Compiler’s Notes.** — For words “this act”  
see Compiler’s notes, § 68-501.

#### Official Comment

This provision is taken from the Illinois act, 760 ILCS § 5/5(d) (1992), and is meant to facilitate incorporation of the Act by means of the formulaic language commonly used in trust instruments.

**68-511. Application to existing trusts.** — This act applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective dates, this act governs only decisions or actions occurring after that date. [I.C., § 68-511, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Compiler’s Notes.** — For words “this act”  
see Compiler’s notes, § 68-501.

**68-512. Uniformity of application and construction.** — This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among the states enacting it. [I.C., § 68-512, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Compiler’s Notes.** — For words “this act”  
see Compiler’s notes, § 68-501.

**68-513. Short title.** — This act may be cited as the “Idaho Uniform Prudent Investor Act.” [I.C., § 68-513, as added by 1997, ch. 14, § 2, p. 14.]

#### STATUTORY NOTES

**Compiler’s Notes.** — For words “this act”  
see Compiler’s notes, § 68-501.

**68-514. Guardians.** — The provisions of this act shall apply to and govern any bank, trust company, or individual authorized and duly appointed, by a court of competent jurisdiction, to act as a guardian under the laws of the state of Idaho. [I.C., § 68-514, as added by 1997, ch. 14, § 2, p. 14.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-501.

## CHAPTER 6

## NOMINEE REGISTRATION ACT

## SECTION.

68-601. Establishment of nominee registration.

68-602. Corporation's duty to inquire into a transfer.

## SECTION.

68-603. Short title.

**68-601. Establishment of nominee registration.** — Any bank or trust company acting as a fiduciary, whether alone or jointly with an individual or individuals, may, with the consent of the individual fiduciary or fiduciaries, if any (who are hereby authorized to give such consent), cause any bond, stock, mortgage, deed or other security or asset, real or personal, including a fractional interest thereof, held in any fiduciary capacity to be held in the name of a nominee or nominees of such bank or trust company without reference to or mention of the fiduciary relationship; provided, that the trust company's records for and all reports or accounts rendered concerning the fiduciary relationship clearly show the ownership of the property by the bank or trust company and that the nominee or nominees of the bank or trust company indorse in blank, or execute a conveyance or assignment to the bank or trust company for, each item of property held in its name. A bank or trust company shall be responsible for the acts of any nominee with respect to any property held in the name of a nominee. [1949, ch. 33, § 1, p. 56.]

## STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**68-602. Corporation's duty to inquire into a transfer.** — A corporation and its transfer agent shall be under no obligation to inquire into the propriety of a transfer of any stock or security held in a nominee's name unless the corporation or transfer agent has actual knowledge of a breach of fiduciary duty in connection with assets so held. [1949, ch. 33, § 2, p. 56.]

**68-603. Short title.** — This act may be cited as the Nominee Registration Act. [1949, ch. 33, § 3, p. 56.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1949, ch. 33, compiled as §§ 68-601 — 68-603.

Section 4 of S.L. 1949, ch. 33 provided as

follows: "If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions or applications



of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.”

Section 5 of S.L. 1949, ch. 33, repealed all acts or parts of acts in conflict therewith.

**Effective Dates.** — Section 6 of S.L. 1949, ch. 33 declared an emergency and provided it should apply to fiduciary relationships then in existence or thereafter established. Approved February 5, 1949.

## CHAPTER 7

### UNIFORM COMMON TRUST FUND ACT

SECTION.

68-701. Establishment of common trust funds.

68-702. Uniformity of interpretation.

SECTION.

68-703. Short title.

**68-701. Establishment of common trust funds.** — (1) Any bank or trust company, state or national, qualified to act as fiduciary in this state may establish common trust funds for the purpose of furnishing investments to itself as fiduciary, to an affiliated bank or trust company as fiduciary, or to itself or an affiliated bank or trust company and others, as co-fiduciaries; and may, as such fiduciary, affiliate of a fiduciary or co-fiduciary, or co-fiduciary, invest funds which it lawfully holds for investment in interests in such common trust funds administered by itself or by any affiliated bank or trust company, if such investment is not prohibited by the instrument, judgment, decree, or order creating such fiduciary relationship, and if, in the case of co-fiduciaries, the bank or trust company procures the consent of its co-fiduciaries to such investment.

(2) For purposes of this section, two (2) or more banks or trust companies are affiliated if they are members of the same affiliated group, within the meaning of section 1504 of the United States internal revenue code, as amended, whether the affiliate’s principal place of business is within or without the state of Idaho. [1949, ch. 34, § 1, p. 57; am. 1986, ch. 55, § 1, p. 162.]

### STATUTORY NOTES

**Comparable Provisions.** — **Mont.** Code Ann. §§ 32-1-701 to 32-1-708.

**Nev.** Rev. Stat. Ann. §§ 164.070 to 164.100.

**Wash.** Rev. Code, §§ 11.102.010 to 11.102.050.

**Wyo.** Stat. §§ 2-3-401 to 2-3-403.

### RESEARCH REFERENCES

**A.L.R.** — Distribution of funds where funds of more than one trust have been commingled by trustee and balance is insufficient to satisfy all trust claims. 17 A.L.R.3d 937.

Trustee’s power to exchange trust property for share of corporation organized to hold the property. 20 A.L.R.3d 841.

**68-702. Uniformity of interpretation.** — This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1949, ch. 34, § 2, p. 57.]



## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1949, ch. 34, compiled as §§ 68-701 — 68-703.

**68-703. Short title.** — This act may be cited as the Uniform Common Trust Fund Act. [1949, ch. 34, § 3, p. 57.]

## STATUTORY NOTES

**Compiler's Notes.** — For the words "this act" see Compiler's notes, § 68-702.

Section 5 of S.L. 1949, ch. 34 repealed all acts or parts of acts in conflict therewith.

Section 4 of S.L. 1949, ch. 34 provided as follows: "If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions or applications

of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable."

**Effective Dates.** — Section 6 of S.L. 1949, ch. 34 declared an emergency and provided it should apply to fiduciary relationships then in existence or thereafter established. Approved February 5, 1949.

## CHAPTER 8

## TRANSFERS TO MINORS

## SECTION.

- 68-801. Definitions.
- 68-802. Scope and jurisdiction.
- 68-803. Nomination of custodian.
- 68-804. Transfer by gift or exercise of power of appointment.
- 68-805. Transfer authorized by will or trust.
- 68-806. Other transfer by fiduciary.
- 68-807. Transfer by obligor.
- 68-808. Receipt for custodial property.
- 68-809. Manner of creating custodial property and effecting transfer — Designation of initial custodian — Control.
- 68-810. Single custodianship.
- 68-811. Validity and effect of transfer.
- 68-812. Care of custodial property.
- 68-813. Powers of custodian.
- 68-814. Use of custodial property.

## SECTION.

- 68-815. Custodian's expenses, compensation, and bond.
- 68-816. Exemption of third person from liability.
- 68-817. Liability to third persons.
- 68-818. Renunciation, resignation, death, or removal of custodian — Designation of successor custodian.
- 68-819. Accounting by and determination of liability of custodian.
- 68-820. Termination of custodianship.
- 68-821. Applicability.
- 68-822. Effect on existing custodianships.
- 68-823. Uniformity of application and construction.
- 68-824. Short title.
- 68-825. Severability.

**68-801. Definitions.** — As used in this chapter:

(1) "Adult" means an individual who has attained the age of twenty-one (21) years.

(2) "Benefit plan" means an employer's plan for the benefit of an employee or partner.

(3) "Broker" means a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others.

(4) "Conservator" means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions.

(5) "Court" means the district courts of the state of Idaho.

(6) "Custodial property" means (i) any interest in property transferred to a custodian under this chapter and (ii) the income from and proceeds of that interest in property.

(7) "Custodian" means a person so designated under section 68-809, Idaho Code, or a successor or substitute custodian designated under section 68-818, Idaho Code.

(8) "Financial institution" means a bank, trust company, savings and loan association, or credit union, chartered and supervised under state or federal law.

(9) "Legal representative" means an individual's personal representative or conservator.

(10) "Member of the minor's family" means the minor's parent, stepparent, spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption.

(11) "Minor" means an individual who has not attained the age of twenty-one (21) years.

(12) "Person" means an individual, corporation, organization, or other legal entity.

(13) "Personal representative" means an executor, administrator, successor personal representative, or special administrator of a decedent's estate or a person legally authorized to perform substantially the same functions.

(14) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(15) "Transfer" means a transaction that creates custodial property under section 68-809, Idaho Code.

(16) "Transferor" means a person who makes a transfer under this chapter.

(17) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers. [I.C., § 68-801, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former §§ 68-801 — 68-810, which comprised 1967, ch. 119, §§ 1-10, p. 253; am. 1972, ch. 160, §§ 1-3, p. 354; am. 1981, ch. 244, § 1, p. 487, were repealed by S.L. 1984, ch. 152, § 1.

**Comparable Provisions.** — Colo. Rev. Stat. §§ 11-50-101 — 11-50-126.

Mont. Code Ann. §§ 72-26-501 to 72-26-803.

Nev. Rev. Stat. Ann. §§ 167.010 to 167.100.

Or. Rev. Stat. §§ 126.805 to 126.886.

Wyo. Stat. 1977, §§ 34-13-114 to 34-13-137.

**68-802. Scope and jurisdiction.** — (1) This chapter applies to a transfer that refers to this chapter in the designation under section 68-809(1), Idaho Code, by which the transfer is made, if at the time of the transfer, the transferor, the minor, or the custodian is a resident of this state or the custodial property is located in this state. The custodianship so created remains subject to this chapter despite a subsequent change in residence of a transferor, the minor, or the custodian, or the removal of custodial property from this state.

(2) A person designated as custodian under this chapter is subject to personal jurisdiction in this state with respect to any matter relating to the custodianship.

(3) A transfer that purports to be made and which is valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act, or a substantially similar act, of another state is governed by the law of the designated state and may be executed and is enforceable in this state if, at the time of the transfer, the transferor, the minor, or the custodian is a resident of the designated state or the custodial property is located in the designated state. [I.C., § 68-802, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-802 was repealed. See Prior Laws, § 68-801.

#### RESEARCH REFERENCES

**Am. Jur.** — 38 Am. Jur. 2d, Gifts, § 16.

**68-803. Nomination of custodian.** — (1) A person having the right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence of the event by naming the custodian, followed in substance by the words: "as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines, or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights which is registered with or delivered to the payor, issuer, or other obligor of the contractual rights.

(2) A custodian nominated under this section must be a person to whom a transfer of property of that kind may be made under section 68-809(1), Idaho Code.

(3) The nomination of a custodian under this section does not create custodial property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under section 68-809, Idaho Code. Unless the nomination of a custodian has been revoked, upon the occurrence of the future event, the custodianship becomes effective and the custodian shall enforce a transfer of the custodial property pursuant to section 68-809, Idaho Code. [I.C., § 68-803, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-803 was repealed. See Prior Laws, § 68-801.

**Compiler's Notes.** — The words enclosed

in parentheses so appeared in the law as enacted.



**68-804. Transfer by gift or exercise of power of appointment.** — A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to section 68-809, Idaho Code. [I.C., § 68-804, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-804 was repealed. See Prior Laws, § 68-801.

**68-805. Transfer authorized by will or trust.** — (1) A personal representative or trustee may make an irrevocable transfer pursuant to section 68-809, Idaho Code, to a custodian for the benefit of a minor as authorized in the governing will or trust.

(2) If the testator or settlor has nominated a custodian under section 68-803, Idaho Code, to receive the custodial property, the transfer must be made to that person.

(3) If the testator or settlor has not nominated a custodian under section 68-803, Idaho Code, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind under section 68-809(1), Idaho Code. [I.C., § 68-805, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-805 was repealed. See Prior Laws, § 68-801.

**68-806. Other transfer by fiduciary.** — (1) Subject to subsection (3) of this section, a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to section 68-809, Idaho Code, in the absence of a will or under a will or trust that does not contain an authorization to do so.

(2) Subject to subsection (3) of this section, a conservator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to section 68-809, Idaho Code.

(3) A transfer under subsection (1) or (2) of this section may be made only if (i) the personal representative, trustee, or conservator considers the transfer to be in the best interest of the minor, (ii) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument, and (iii) the transfer is authorized by the court if it exceeds ten thousand dollars (\$10,000) in value. [I.C., § 68-806, as added by 1984, ch. 152, § 2, p. 356.]



## STATUTORY NOTES

**Prior Laws.** — Former § 68-806 was repealed. See Prior Laws, § 68-801.

**68-807. Transfer by obligor.** — (1) Subject to subsections (2) and (3), a person not subject to the provisions of either section 68-805 or 68-806, Idaho Code, who holds property of or owes a liquidated debt to a minor not having a conservator may make an irrevocable transfer to a custodian for the benefit of the minor pursuant to section 68-809, Idaho Code.

(2) If a person having the right to do so under section 68-803, Idaho Code, has nominated a custodian under that section to receive the custodial property, the transfer must be made to that person.

(3) If no custodian has been nominated under section 68-803, Idaho Code, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family or to a trust company unless the property exceeds ten thousand dollars (\$10,000) in value. [I.C., § 68-807, as added by 1984, ch. 152, § 2, p. 356.]

## STATUTORY NOTES

**Prior Laws.** — Former § 68-807 was repealed. See Prior Laws, § 68-801.

**68-808. Receipt for custodial property.** — A written acknowledgment of delivery by a custodian constitutes a sufficient receipt and discharge for custodial property transferred to the custodian pursuant to this chapter. [I.C., § 68-808, as added by 1984, ch. 152, § 2, p. 356.]

## STATUTORY NOTES

**Prior Laws.** — Former § 68-808 was repealed. See Prior Laws, § 68-801.

**68-809. Manner of creating custodial property and effecting transfer — Designation of initial custodian — Control.** — (1) Custodial property is created and a transfer is made whenever:

(a) An uncertificated security or a certificated security in registered form is either:

1. registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act"; or

2. delivered if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or to a trust company as custodian, accompanied by an instrument in substantially the form set forth in subsection (2) of this section;

(b) Money is paid or delivered to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”;

(c) The ownership of a life or endowment insurance policy or annuity contract is either:

1. registered with the issuer in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”; or

2. assigned in a writing delivered to an adult other than the transferor or to a trust company whose name in the assignment is followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”;

(d) An irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract is the subject of a written notification delivered to the payor, issuer, or other obligor that the right is transferred to the transferor, an adult other than the transferor, or a trust company, whose name in the notification is followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”;

(e) An interest in real property is recorded in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”;

(f) A certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

1. issued in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”; or

2. delivered to an adult other than the transferor or to a trust company, endorsed to that person, followed in substance by the words: “as custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act”; or

(g) An interest in any property not described in paragraphs (a) through (f) is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in subsection (2) of this section.

(2) An instrument in the following form satisfies the requirements of paragraphs (a)2. and (g) of subsection (1):

**“TRANSFER UNDER THE IDAHO UNIFORM  
TRANSFERS TO MINORS ACT**

I, (name of transferor or name and representative capacity if a fiduciary) hereby transfer to (name of custodian), as custodian for (name of minor)

under the Idaho Uniform Transfers to Minors Act, the following: (insert a description of the custodial property sufficient to identify it).

Dated:

(Signature)

(name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the Idaho Uniform Transfers to Minors Act.

Dated:

(Signature of Custodian)"

(3) A transferor shall place the custodian in control of the custodial property as soon as practicable. [I.C., § 68-809, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-809 was repealed. See Prior Laws, § 68-801. in parentheses so appeared in the law as enacted.

**Compiler's Notes.** — The words enclosed

**68-810. Single custodianship.** — A transfer may be made only for one (1) minor, and only one (1) person may be the custodian. All custodial property held under this chapter by the same custodian for the benefit of the same minor constitutes a single custodianship. [I.C., § 68-810, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-810 was repealed. See Prior Laws, § 68-801.

**68-811. Validity and effect of transfer.** — (1) The validity of a transfer made in a manner prescribed in this chapter is not affected by:

- (a) Failure of the transferor to comply with section 68-809(3), Idaho Code, concerning possession and control;
- (b) Designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian under section 68-809(1), Idaho Code; or
- (c) Death or incapacity of a person nominated under section 68-803, Idaho Code, or designated under section 68-809, Idaho Code, as custodian or the disclaimer of the office by that person.

(2) A transfer made pursuant to section 68-809, Idaho Code, is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties, and authority provided in this chapter, and neither the minor nor the minor's legal representative has any right, power, duty, or authority with respect to the custodial property except as provided in this chapter.

(3) By making a transfer, the transferor incorporates in the disposition all the provisions of this chapter and grants to the custodian, and to any third person dealing with a person designated as custodian, the respective



powers, rights, and immunities provided in this chapter. [I.C., § 68-811, as added by 1984, ch. 152, § 2, p. 356.]

**68-812. Care of custodial property.** — (1) A custodian shall:

- (a) Take control of custodial property;
- (b) Register or record title to custodial property if appropriate; and
- (c) Collect, hold, manage, invest, and reinvest custodial property.

(2) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

(3) A custodian may invest in or pay premiums on life insurance or endowment policies on (i) the life of the minor only, if the minor or the minor's estate is the sole beneficiary, or (ii) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary.

(4) A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: "as a custodian for (name of minor) under the Idaho Uniform Transfers to Minors Act."

(5) A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if the minor has attained the age of fourteen (14) years. [I.C., § 68-812, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**68-813. Powers of custodian.** — (1) A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in that capacity only.



(2) The provisions of this section do not relieve a custodian from liability for breach of the provisions of section 68-812, Idaho Code. [I.C., § 68-813, as added by 1984, ch. 152, § 2, p. 356.]

**68-814. Use of custodial property.** — (1) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

(2) On petition of an interested person or the minor if the minor has attained the age of fourteen (14) years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit, so much of the custodial property as the court considers advisable for the use and benefit of the minor.

(3) A delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor. [I.C., § 68-814, as added by 1984, ch. 152, § 2, p. 356.]

**68-815. Custodian's expenses, compensation, and bond.** — (1) A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(2) Except for one who is a transferor under section 68-804, Idaho Code, a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year.

(3) Except as provided in section 68-818(6), Idaho Code, a custodian need not give a bond. [I.C., § 68-815, as added by 1984, ch. 152, § 2, p. 356.]

**68-816. Exemption of third person from liability.** — A third person, in good faith and without court order, may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

(1) The validity of the purported custodian's designation;

(2) The propriety of, or the authority under this chapter for, any act of the purported custodian;

(3) The validity or propriety under this chapter of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or

(4) The propriety of the application of any property of the minor delivered to the purported custodian. [I.C., § 68-816, as added by 1984, ch. 152, § 2, p. 356.]

**68-817. Liability to third persons.** — (1) A claim based on (i) a contract entered into by a custodian acting in a custodial capacity, (ii) an obligation arising from the ownership or control of custodial property, or (iii) a tort committed during the custodianship, may be asserted against the

custodial property by proceeding against the custodian in the custodial capacity, whether or not the custodian or the minor is personally liable therefor.

(2) A custodian is not personally liable:

(a) On a contract properly entered into in the custodial capacity, unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(b) For an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

(3) A minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship, unless the minor is personally at fault. [I.C., § 68-817, as added by 1984, ch. 152, § 2, p. 356.]

**68-818. Renunciation, resignation, death, or removal of custodian — Designation of successor custodian.** — (1) A person nominated under section 68-803, Idaho Code, or designated under section 68-809, Idaho Code, as custodian may decline to serve by delivering a valid disclaimer to the person who made the nomination or to the transferor or the transferor's legal representative. If the event giving rise to a transfer has not occurred and no substitute custodian able, willing, and eligible to serve was nominated under section 68-803, Idaho Code, the person who made the nomination may nominate a substitute custodian under section 68-803, Idaho Code; otherwise the transferor or the transferor's legal representative shall designate a substitute custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under section 68-809(1), Idaho Code. The custodian so designated has the rights of a successor custodian.

(2) A custodian, at any time, may designate a trust company or an adult other than a transferor under section 68-804, Idaho Code, as successor custodian by executing and dating an instrument of designation before a subscribing witness other than the successor. If the instrument of designation does not contain or is not accompanied by the resignation of the custodian, the designation of the successor does not take effect until the custodian resigns, dies, becomes incapacitated, or is removed.

(3) A custodian may resign at any time by delivering written notice to the minor, if the minor has attained the age of fourteen (14) years, and to the successor custodian and by delivering the custodial property to the successor custodian.

(4) If a custodian is ineligible, dies, or becomes incapacitated without having effectively designated a successor and the minor has attained the age of fourteen (14) years, the minor may designate as successor custodian, in the manner prescribed in subsection (2) of this section, an adult member of the minor's family, a conservator of the minor, or a trust company. If the minor has not attained the age of fourteen (14) years, or fails to act with [within] sixty (60) days after the ineligibility, death, or incapacity, the conservator of the minor becomes successor custodian. If the minor has no



conservator or the conservator declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or any other interested person, may petition the court to designate a successor custodian.

(5) A custodian who declines to serve under subsection (1) of this section or resigns under subsection (3) of this section, or the legal representative of a deceased or incapacitated custodian, as soon as practicable, shall put the custodial property and records in the possession and control of the successor custodian. The successor custodian, by action, may enforce the obligation to deliver custodial property and records and becomes responsible for each item as received.

(6) A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor, or the minor, if the minor has attained the age of fourteen (14) years, may petition the court to remove the custodian for cause and to designate a successor custodian other than a transferor under section 68-804, Idaho Code, or to require the custodian to give appropriate bond. [I.C., § 68-818, as added by 1984, ch. 152, § 2, p. 356.]

#### STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "within" in the second sentence of subsection (4) was inserted by the compiler.

**68-819. Accounting by and determination of liability of custodian.** — (1) A minor who has attained the age of fourteen (14) years, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative may petition the court (i) for an accounting by the custodian or the custodian's legal representative; or (ii) for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property, unless the responsibility has been adjudicated in an action under section 68-817, Idaho Code, to which the minor or the minor's legal representative was a party.

(2) A successor custodian may petition the court for an accounting by the predecessor custodian.

(3) The court, in a proceeding under this chapter or in any other proceeding, may require or permit the custodian or the custodian's legal representative to account.

(4) If a custodian is removed under section 68-818(6), Idaho Code, the court shall require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property. [I.C., § 68-819, as added by 1984, ch. 152, § 2, p. 356.]

**68-820. Termination of custodianship.** — The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:



(1) The minor's attainment of twenty-one (21) years of age with respect to custodial property transferred under section 68-804 or section 68-805, Idaho Code;

(2) The minor's attainment of eighteen (18) years of age, with respect to custodial property transferred under section 68-806 or section 68-807, Idaho Code;

(3) The minor's death. [I.C., § 68-820, as added by 1984, ch. 152, § 2, p. 356.]

**68-821. Applicability.** — The provisions of this chapter apply to a transfer within the scope of section 68-802, Idaho Code, made after its effective date [July 1, 1984] if:

(1) The transfer purports to have been made under the Uniform Gifts to Minors Act of Idaho; or

(2) The instrument by which the transfer purports to have been made uses in substance the designation "as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and the application of this chapter is necessary to validate the transfer. [I.C., § 68-821, as added by 1984, ch. 152, § 2, p. 356.]

**68-822. Effect on existing custodianships.** — (1) Any transfer of custodial property as now defined in this chapter made before July 1, 1984, is validated, notwithstanding that there was no specific authority in the Uniform Gifts to Minors Act of Idaho, for the coverage of custodial property of that kind or for a transfer from that source at the time the transfer was made.

(2) The provisions of this chapter apply to all transfers made before the effective date [July 1, 1984] of this chapter, in a manner and form prescribed in the Uniform Gifts to Minors Act of Idaho, except insofar as the application impairs constitutionally vested rights or extends the duration of custodianships in existence on the effective date of this chapter.

(3) Sections 68-801 and 68-820, Idaho Code, with respect to the age of a minor for whom custodial property is held under this chapter, do not apply to custodial property held in a custodianship that terminated because of the minor's attainment of the age of eighteen (18) years after July 1, 1972 and before July 1, 1984. [I.C., § 68-822, as added by 1984, ch. 152, § 2, p. 356.]

**68-823. Uniformity of application and construction.** — The provisions of this chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. [I.C., § 68-823, as added by 1984, ch. 152, § 2, p. 356.]

**68-824. Short title.** — This chapter may be cited as the "Idaho Uniform Transfers to Minors Act." [I.C., § 68-824, as added by 1984, ch. 152, § 2, p. 356.]

**68-825. Severability.** — The provisions of this chapter are hereby declared to be severable and if any provision of this chapter or the

application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this chapter. [I.C., § 68-825, as added by 1984, ch. 152, § 2, p. 356.]

## CHAPTER 9

### SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS

#### SECTION.

- 68-901. Definitions.
- 68-902. Registration in the name of a fiduciary.
- 68-903. Assignment by a fiduciary.
- 68-904. Evidence of appointment or incumbency.
- 68-905. Adverse claims.

#### SECTION.

- 68-906. Nonliability of corporation and transfer agent.
- 68-907. Nonliability of third persons.
- 68-908. Territorial application.
- 68-909. Tax obligations.
- 68-910. Uniformity of interpretation.
- 68-911. Short title.

**68-901. Definitions.** — In this act, unless the context otherwise requires:

(a) "Assignment" includes any written stock power, bond power, bill of sale, deed, declaration of trust, or other instrument of transfer.

(b) "Claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir, or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee, or a minor owner of a security registered in the name of a custodian, or a claim of any similar interest, whether the claim is asserted by the claimant or by a fiduciary or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties.

(c) "Corporation" means a private or public corporation, association or trust issuing a security.

(d) "Fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian, or nominee.

(e) "Person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal or commercial entity.

(f) "Security" includes any share of stock, bond, debenture, note, or other security issued by a corporation which is registered as to ownership on the books of the corporation.

(g) "Transfer" means a change on the books of a corporation in the registered ownership of a security.

(h) "Transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation. [1959, ch. 136, § 1, p. 294.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1959, ch. 136, compiled as §§ 68-901 — 68-911.

**68-902. Registration in the name of a fiduciary.** — A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship; and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security. [1959, ch. 136, § 2, p. 294.]

**68-903. Assignment by a fiduciary.** — Except as otherwise provided in this act, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary

(a) may assume without inquiry that the assignment even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties;

(b) may assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

(c) is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession. [1959, ch. 136, § 3, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-901.

#### RESEARCH REFERENCES

**A.L.R.** — Construction and effect of UCC Art. 8, dealing with investment securities. 21 A.L.R.3d 964; 88 A.L.R.3d 949.

**68-904. Evidence of appointment or incumbency.** — A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

(a) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty (60) days before the transfer; or

(b) In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subsection provided such standards are not manifestly



unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this paragraph (b) except to the extent that the contents relate directly to the appointment or incumbency. [1959, ch. 136, § 4, p. 294.]

**68-905. Adverse claims.** — (a) A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner, and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer. Nothing in this act relieves the corporation or transfer agent of any liability for making or refusing to make the transfer after it is so put on notice, unless it proceeds in the manner authorized in subsection (b).

(b) As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice it shall withhold the transfer for thirty (30) days after the mailing and shall then make the transfer unless restrained by a court order. [1959, ch. 136, § 5, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-901.

**68-906. Nonliability of corporation and transfer agent.** — A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by this act. [1959, ch. 136, § 6, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-901.

**68-907. Nonliability of third persons.** — (a) No person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary, including a person who guarantees the signature of the fiduciary, (is liable for participation in any breach of fiduciary,) is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

(b) If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the

fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this act incurs no liability.

(c) This section does not impose any liability upon the corporation or its transfer agent. [1959, ch. 136, § 7, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "is liable for participation in any breach of fiduciary" were enclosed in parentheses by the compiler as surplusage.

For words "this act" see Compiler's notes, § 68-901.

**68-908. Territorial application.** — (a) The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

(b) This act applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in the state in connection with the acquisition, disposition, assignment, or transfer of a security by or to a fiduciary and of a person who guarantees in this state the signature of a fiduciary in connection with such a transaction. [1959, ch. 136, § 8, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-901.

**68-909. Tax obligations.** — This act does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession, or other taxes imposed by the laws of this state. [1959, ch. 136, § 9, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-901.

**68-910. Uniformity of interpretation.** — This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. [1959, ch. 136, § 10, p. 294.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 68-901.

**68-911. Short title.** — This act may be cited as the Uniform Act for the Simplification of Fiduciary Security Transfers. [1959, ch. 136, § 11, p. 294.]

## STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's notes, § 68-901.

Section 12 of S.L. 1959, ch. 136 repealed

§ 68-303, Idaho Code, and all other laws or parts of laws in conflict therewith.

## CHAPTER 10

## UNIFORM PRINCIPAL AND INCOME ACT

## PART 1. DEFINITIONS AND FIDUCIARY DUTIES

## SECTION.

68-10-101. Short title.

68-10-102. Definitions.

68-10-103. Fiduciary duties — General principles.

68-10-104. Trustee's power to adjust.

68-10-105. Notice of proposed action.

## PART 2. DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST

68-10-201. Determination and distribution of net income.

68-10-202. Distribution to residuary and remainder beneficiaries.

## PART 3. APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

68-10-301. When right to income begins and ends.

68-10-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.

68-10-303. Apportionment when income interest ends.

## PART 4. ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST

68-10-401. Character of receipts.

68-10-402. Distribution from trust or estate.

68-10-403. Business and other activities conducted by trustee.

68-10-404. Principal receipts.

68-10-405. Rental property.

## SECTION.

68-10-406. Obligation to pay money.

68-10-407. Insurance policies and similar contracts.

68-10-408. Insubstantial allocations not required.

68-10-409. Deferred compensation, annuities, and similar payments.

68-10-410. Liquidating asset.

68-10-411. Minerals, water and other natural resources.

68-10-412. Timber.

68-10-413. Property not productive of income.

68-10-414. Derivatives and options.

68-10-415. Asset-backed securities.

## PART 5. ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

68-10-501. Disbursements from income.

68-10-502. Disbursements from principal.

68-10-503. Transfers from income to principal for depreciation.

68-10-504. Transfers from income to reimburse principal.

68-10-505. Income taxes.

68-10-506. Adjustments between principal and income because of taxes.

## PART 6. MISCELLANEOUS PROVISIONS

68-10-601. Uniformity of application and construction.

68-10-602. Severability clause.

68-10-603, 68-10-604. [Reserved.]

68-10-605. Application of chapter to existing trusts and estates.

## STATUTORY NOTES

**Compiler's Notes.** — The following sections were repealed by S.L. 2001, ch. 261, § 1:

68-1001, which comprised 1963, ch. 187, § 1, p. 556.

68-1002, which comprised 1963, ch. 187, § 2, p. 556.

68-1003, which comprised 1963, ch. 187, § 3, p. 556.

68-1004, which comprised 1963, ch. 187, § 4, p. 556.

68-1005, which comprised 1963, ch. 187, § 5, p. 556.

68-1006, which comprised 1963, ch. 187, § 6, p. 556.

68-1007, which comprised 1963, ch. 187, § 7, p. 556.

68-1008, which comprised 1963, ch. 187, § 8, p. 556.

68-1009, which comprised 1963, ch. 187, § 9, p. 556.

68-1010, which comprised 1963, ch. 187, § 10, p. 556.

68-1011, which comprised 1963, ch. 187, § 11, p. 556.



68-1012, which comprised 1963, ch. 187,  
 § 12, p. 556.  
 68-1013, which comprised 1963, ch. 187,  
 § 13, p. 556.  
 68-1014, which comprised 1963, ch. 187,  
 § 14, p. 556.

68-1015, which comprised 1963, ch. 187,  
 § 15, p. 556.  
 68-1016, which comprised 1963, ch. 187,  
 § 16, p. 556.

## PART 1. DEFINITIONS AND FIDUCIARY DUTIES

**68-10-101. Short title.** — This chapter may be cited as the “Uniform Principal and Income Act.” [I.C., § 68-10-101, as added by 2001, ch. 261, § 2, p. 943.]

### STATUTORY NOTES

**Comparable Provisions.** — **Mont.** Code Ann. §§ 72-34-421 to 72-34-453.

**Nev.** Rev. Stat. Ann. §§ 164.720 to 164.925.

**Or.** Rev. Stat. §§ 129.200 to 129.450.

**Utah.** Code Ann. §§ 22-3-101 to 22-3-603.

**Wash.** Rev. Code §§ 11.104.010 to 11.104.940.

**Wyo.** Stat. §§ 2-3-801 to 2-3-834.

**68-10-102. Definitions.** — In this chapter:

(1) “Accounting period” means a calendar year unless another twelve (12) month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve (12) month period that begins when an income interest begins or ends when an income interest ends.

(2) “Beneficiary” includes, in the case of a decedent’s estate, an heir and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) “Fiduciary” means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) “Income” means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in part 4 of this chapter.

(5) “Income beneficiary” means a person to whom net income of a trust is or may be payable.

(6) “Income interest” means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to be distributed or authorize it to be distributed in the trustee’s discretion.

(7) “Mandatory income interest” means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) “Net income” means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this chapter to or from income during the period.

(9) “Person” means: an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture,

government; governmental subdivision, agency or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a trustor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct. Nothing herein shall require a trustee to look beyond the terms of a written instrument for the manifestation of the intent of a trustor.

(13) "Trustee" includes an original, additional or successor trustee, whether or not appointed or confirmed by a court. [I.C., § 68-10-102, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

"Income beneficiary." The definitions of income beneficiary (Section 102(5)) and income interest (Section 102(6)) cover both mandatory and discretionary beneficiaries and interests. There are no definitions for "discretionary income beneficiary" or "discretionary income interest" because those terms are not used in the Act.

Inventory value. There is no definition for inventory value in this Act because the provisions in which that term was used in the 1962 Act have either been eliminated (in the case of the underproductive property provision) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations, property subject to depletion, and the method for determining entitlement

to income distributed from a probate estate).

"Net income." The reference to "transfers under this Act to or from income" means transfers made under Sections 104(a), 412(b), 502(b), 503(b), 504(a), and 506.

"Terms of a trust." This term was chosen in preference to "terms of the trust instrument" (the phrase used in the 1962 Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents. The definition is based on the Restatement (Second) of Trusts § 4 (1959) and the Restatement (Third) of Trusts § 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.

**68-10-103. Fiduciary duties — General principles.** — (a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of parts 2 and 3 of this chapter, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter, and no inference that the fiduciary has improperly exercised the discretion arises from the fact that the fiduciary has made an allocation contrary to a provision of this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under section 68-10-104(a), Idaho Code, or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one (1) or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries. [I.C., § 68-10-103, as added by 2001, ch. 261, § 2, p. 943.]

### JUDICIAL DECISIONS

#### Application.

A trust document controls in most situations and this Act is not assumed to apply. If the trust document has terms contrary to the provisions of the Act, the trust document controls. The trust document also controls when the language of the trust document is

clear and unambiguous. Only if the language of the trust document is ambiguous and the terms of the trust document are not contrary to the provisions of the Act will the Act apply. *Hedrick v. West One Bank*, 123 Idaho 803, 853 P.2d 548 (1993).

### RESEARCH REFERENCES

**Am. Jur.** — 76 Am. Jur. 2d, Trusts, § 549 et seq.

**C.J.S.** — 80 C.J.S., Trusts, § 525 et seq.

**A.L.R.** — Allocation, as between income and principal, of income on property used in paying legacies, debts and expenses. 2 A.L.R.3d 1061.

Distribution of income increased by declaration of invalidity of express direction for

accumulation. 17 A.L.R.3d 231.

Propriety of considering beneficiary's other means under trust provision authorizing invasion of principal for beneficiary's support. 41 A.L.R.3d 255.

Modern status of rules governing allocations of stock dividends or splits between principal and income. 81 A.L.R.3d 876.

### Official Comment

Prior Act. The rule in Section 2(a) of the 1962 Act is restated in Section 103(a), without changing its substance, to emphasize that the Act contains only default rules and that provisions in the terms of the trust are paramount. However, Section 2(a) of the 1962 Act applies only to the allocation of receipts and disbursements to or between principal and income. In this Act, the first sentence of Section 103(a) states that it also applies to matters within the scope of Articles 2 and 3. Section 103(a)(2) incorporates the rule in Section 2(b) of the 1962 Act that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.

The Act deletes the language that appears at the end of 1962 Act Section 2(a)(3) — “and in view of the manner in which men of ordi-

nary prudence, discretion and judgment would act in the management of their affairs” — because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs do not normally think in terms of the interests of successive beneficiaries. If there is an analogy to an individual's decision-making process, it is probably the individual's decision to spend or to save, but this is not a useful guideline for trust administration. No case has been found in which a court has relied on the “prudent man” rule of the 1962 Act.

Fiduciary discretion. The general rule is that if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. Restatement (Second) of Trusts § 187. The situations in which a court will control the exercise of a trustee's



discretion are discussed in the comments to § 187. See also *id.* § 233 Comment p.

Questions for which there is no provision. Section 103(a)(4) allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available at the present time (inflation-indexed bonds might have fallen into this category had they been announced after this Act was approved by the Commissioners on Uniform State Laws) or because a transaction is of a type or occurs in a manner not anticipated by the Drafting Committee for this Act or the drafter of the trust instrument.

Allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary's level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 103(b), after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under Section 104(a).

Duty of impartiality. Whenever there are

two or more beneficiaries, a trustee is under a duty to deal impartially with them. Restatement of Trusts 3d: Prudent Investor Rule § 183 (1992). This rule applies whether the beneficiaries' interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. *Id.* § 183, Comment a. "The precise meaning of the trustee's duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time." *Id.* § 232, Comment c.

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that this Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in this Act, the trustee has an implied grant of discretion to decide the question. Section 103(b) provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

**68-10-104. Trustee's power to adjust.** — (a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor in accordance with the Idaho uniform prudent investor act, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in section 68-10-103(a), Idaho Code, that the trustee is unable to comply with section 68-10-103(b), Idaho Code.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

- (1) The nature, purpose and expected duration of the trust;
- (2) The intent of the trustor;
- (3) The identity and circumstances of the beneficiaries;
- (4) The needs for liquidity, regularity of income and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the trustor;

(6) The net amount allocated to income under the other sections of this chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee may not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who is the trustee or has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment; or

(7) If the trustee is a beneficiary of the trust.

(d) If subsection (c)(5), (6) or (7) of this section applies to a trustee and there is more than one (1) trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may release the entire power conferred by subsection (a) of this section or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain



about whether possessing or exercising the power will cause a result described in subsection (c)(1) through (6) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The release may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a) of this section.

(g) Unless a request has been made by a beneficiary that the trustee consider an adjustment, nothing in this section or in this chapter is intended to create or imply a duty to make an adjustment, and a trustee is not liable for not considering whether to make an adjustment or for choosing not to make an adjustment. [I.C., § 68-10-104, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

**Purpose and Scope of Provision.** The purpose of Section 104 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 104(a) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 103(a), that he is unable to comply with Section 103(b). In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 104(b), but the trustee may not make an adjustment in circumstances described in Section 104(c).

Section 104 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 104(a) is the requirement in Section 103(b) that "a fiduciary must administer a trust or estate impartially, based on what is fair and

reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion. Restatement (Second) of Trusts § 187 (1959). See also *id.* §§ 183, 232, 233, Comment p (1959).

Section 104 will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in Restatement of Trusts 3d: Prudent Investor Rule. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary's distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary's distribution rights by referring to trust accounting income, Section 104 will be an important tool in trust administration.

Three conditions to the exercise of the power to adjust. The first of the three conditions that must be met before a trustee can exercise the power to adjust—that the trustee invest and manage trust assets as a prudent investor—is expressed in this Act by language derived from the Uniform Prudent Investor Act, but the condition will be met whether the prudent investor rule applies because the Uniform Act or other prudent investor legislation has been enacted, the prudent investor rule has been approved by the courts, or the terms of the trust require it. Even if a State's legislature or courts have not formally adopted the rule, the Restatement establishes



the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a "modest reformulation of the Harvard College dictum and the basic rule of prior Restatements." Restatement of Trusts 3d: Prudent Investor Rule, Introduction, at 5. As a result, there is a basis for concluding that the first condition is satisfied in virtually all States except those in which a trustee is permitted to invest only in assets set forth in a statutory "legal list."

The second condition will be met when the terms of the trust require all of the "income" to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 103(a), i.e., she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion—that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted—she may exercise the power to adjust under Section 104(a).

**Impartiality and productivity of income.** The duty of impartiality between income and remainder beneficiaries is linked to the trustee's duty to make the portfolio productive of

trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust's "income." The 1962 Act implies that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive "delayed income" from the sale proceeds of underproductive property under Section 12 of that Act arises if "any part of principal ... has not produced an average net income of a least 1% per year of its inventory value for more than a year ... ." Under the prudent investor rule, "[t]o whatever extent a requirement of income productivity exists, ... the requirement applies not investment by investment but to the portfolio as a whole." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment i, at 34. The power to adjust under Section 104(a) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 413(b) of this Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed; the rule applies to a marital deduction trust if the trust's assets "consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets ..." — in other words, the section applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 104(a) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio's total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio's liquidity as a whole to make that distribution.

For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments k-p.

Factors to consider in exercising the power to adjust. Section 104(b) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 2(c) of the Uniform Prudent Investor Act sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 2(c) of the Uniform Prudent Investor Act are the source of the factors in paragraphs (3) through (6) and (8) of Section 104(b) (modified where necessary to adapt them to the purposes of this Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that

the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under Section 104. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

Assets received from the settlor. Section 3 of the Uniform Prudent Investor Act provides that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to the retained assets. See Section 104(b)(5); Uniform Prudent Investor Act § 3, Comment, 7B U.L.A. 18, at 25-26 (Supp. 1997); Restatement of Trusts 3d: Prudent Investor Rule § 229 and Comments a-e.

Limitations on the power to adjust. The purpose of subsections (c)(1) through (4) is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (c)(5), (6), and (8) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (c)(7) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (c)(1), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Subsection (c)(1) applies to a trust that qualifies for the marital deduction be-

cause the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property (QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction. Subsection (c)(1) does not apply to a so-called "estate" trust. This type of trust qualifies for the marital deduction because the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually. Reg. § 20.2056(c)-2(b)(1)(iii).

Subsection (c)(3) applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment under Section 104(a). Subsection (c)(3) does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust's income, whichever is greater, subsection (c)(3) does not prevent a trustee from making an adjustment under Section 104(a) in determining the amount of the trust's income.

If subsection (c)(5), (6), (7), or (8), prevents a trustee from exercising the power to adjust, subsection (d) permits a cotrustee who is not subject to the provision to exercise the power unless the terms of the trust do not permit the cotrustee to do so.

Release of the power to adjust. Section 104(e) permits a trustee to release all or part of the power to adjust in circumstances in which the possession or exercise of the power might deprive the trust of a tax benefit or impose a tax burden. For example, if possessing the power would diminish the actuarial value of the income interest in a trust for which the income beneficiary's estate may be eligible to claim a credit for property previously taxed if the beneficiary dies within ten years after the death of the person creating the trust, the trustee is permitted under subsection (e) to release just the power to adjust from income to principal.

Trust terms that limit a power to adjust. Section 104(f) applies to trust provisions that limit a trustee's power to adjust. Since the power is intended to enable trustees to employ the prudent investor rule without being constrained by traditional principal and income rules, an instrument executed before the adoption of this Act whose terms describe the amount that may or must be distributed to a beneficiary by referring to the trust's



income or that prohibit the invasion of principal or that prohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 104(a) if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use. See generally, Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

Examples. The following examples illustrate the application of Section 104:

Example (1) — T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the factors in Section 104(b), T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

Example (2) — T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under Section 406 of this Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

Example (3) — T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of benefi-

cial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

Example (4) — T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 104(a) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

Example (5) — T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of \$600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of \$900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 409(c) of this Act. The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 103(b) include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be



subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary.

Example (6) — T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 501(3). After considering the return from the trust's portfolio as a whole and other relevant factors described in Section 104(b), T may exercise the power to adjust under Section 104(a) to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 103(b).

Example (7) — T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by \$2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under Section 501(1) and the other one-half would have been paid from principal under Section 502(a)(1). After considering the total return from the portfolio as a whole and other relevant factors described in Section 104(b), T may exercise its power to adjust under Section 104(a) by transferring \$1,000, or half of the trust's proportionate share of the fee, from principal to income.

**68-10-105. Notice of proposed action.** — (a) A trustee may give a notice of proposed action regarding a matter governed by this chapter as provided in this section. For the purpose of this section, a proposed action includes a course of action and a decision not to take action.

(b) The trustee shall mail notice of the proposed action to all adult beneficiaries who are receiving, or are entitled to receive, income under the trust or to receive a distribution of principal if the trust were terminated at the time the notice is given. If all beneficiaries of the trust are incapacitated persons, then notice shall be mailed to each of the incapacitated person's guardians or conservators who are appointed in accordance with chapter 5, title 15, Idaho Code.

(c) Notice of proposed action need not be given to any person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(d) The notice of proposed action shall state that it is given pursuant to this section and shall include all of the following:

- (1) The name and mailing address of the trustee;
- (2) A copy of the trust instrument, if any;
- (3) A description of the action proposed to be taken and an explanation of the reasons for the action;
- (4) The time within which objections to the proposed action can be made, which shall be at least thirty (30) days from the mailing of the notice of proposed action;
- (5) The date on or after which the proposed action may be taken or is effective;
- (6) A statement that the recipient may petition for a judicial determination of the proposed action;
- (7) A form on which consent or objection to the proposed action may be indicated.

(e) A beneficiary may object or consent to the proposed action by mailing a written objection or consent to the trustee at the address stated in the notice of proposed action within the time period specified in the notice of proposed action.

(f) A trustee is not liable to a beneficiary for an action regarding a matter governed by this chapter if the trustee does not receive a written objection to the proposed action from the beneficiary within the applicable period and the other requirements of this section are satisfied. If no beneficiary entitled to notice objects under this section, the trustee is not liable to any current or future beneficiary with respect to the proposed action.

(g) If the trustee receives a written objection within the applicable period, either the trustee or a beneficiary may petition the court to have the proposed action taken as proposed, taken with modifications, or denied. In the proceeding, a beneficiary objecting to the proposed action has the burden of proving that the trustee's proposed action should not be taken. A beneficiary who has not objected is not estopped from opposing the proposed action in the proceeding. If the trustee decides not to implement the proposed action, the trustee shall notify the beneficiaries of the decision not to take the action and the reasons for the decision, and the trustee's decision not to implement the proposed action does not itself give rise to liability to any current or future beneficiary. A beneficiary may petition the court to have the action taken, and has the burden of proving that it should be taken. [I.C., § 68-10-105, as added by 2001, ch. 261, § 2, p. 943.]

## PART 2. DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST

**68-10-201. Determination and distribution of net income.** — After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in parts 3 through 5 of this chapter which apply to trustees and the rules in subsection (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in parts 3 through 5 of this chapter which apply to trustees and by:

(A) Including in net income all income from property used to discharge liabilities;

(B) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.



(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under subsection (2) of this section or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by subsection (3) of this section in the manner described in section 68-10-202, Idaho Code, to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subsection (1) of this section because of a payment described in section 68-10-501 or 68-10-502, Idaho Code, to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed. [I.C., § 68-10-201, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Terminating income interests and successive income interests. A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a

beneficiary dies, the beneficiary's income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary's death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a "new" trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power of appointment over the trust



assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

**Gift of a pecuniary amount.** Section 201(3) and (4) provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 5(b)(2) of the 1962 Act.

**Interest on pecuniary amounts.** Section 201(3) provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an inter vivos trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under inter vivos instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, *Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions*, App. B (4th ed. 1997).

**Administration expenses and interest on death taxes.** Under Section 201(2)(B) a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

The United States Supreme Court has considered the question of whether an estate tax marital deduction or charitable deduction

should be reduced when administration expenses are paid from income produced by property passing in trust for a surviving spouse or for charity and deducted for income tax purposes. The Court rejected the IRS position that administration expenses properly paid from income under the terms of the trust or state law must reduce the amount of a marital or charitable transfer, and held that the value of the transferred property is not reduced for estate tax purposes unless the administration expenses are material in light of the income the trust corpus could have been expected to generate. *Commissioner v. Estate of Otis C. Hubert*, 117 S.Ct. 1124 (1997). The provision in Section 201(2)(B) permits a fiduciary to pay and deduct administration expenses from income only to the extent that it will not cause the reduction or loss of an estate tax marital or charitable contributions deduction, which means that the limit on the amount payable from income will be established eventually by Treasury Regulations.

**Interest on estate taxes.** The IRS agrees that interest on estate and inheritance taxes may be deducted for income tax purposes without having to reduce the estate tax deduction for amounts passing to a charity or surviving spouse, whether the interest is paid from principal or income. Rev. Rul. 93-48, 93-2 C.B. 270. For estates of persons who died before 1998, a fiduciary may not want to deduct for income tax purposes interest on estate tax that is deferred under Section 6166 or 6163 because deducting that interest for estate tax purposes may produce more beneficial results, especially if the estate has little or no income or the income tax bracket is significantly lower than the estate tax bracket. For estates of persons who die after 1997, no estate tax or income tax deduction will be allowed for interest paid on estate tax that is deferred under Section 6166. However, interest on estate tax deferred under Section 6163 will continue to be deductible for both purposes, and interest on estate tax deficiencies will continue to be deductible for estate tax purposes if an election under Section 6166 is not in effect.

Under the 1962 Act, Section 13(c)(5) charges interest on estate and inheritance taxes to principal. The 1931 Act has no provision. Section 501(3) of this Act provides that, except to the extent provided in Section 201(2)(B) or (C), all interest must be paid from income.

**68-10-202. Distribution to residuary and remainder beneficiaries.** — (a) Each beneficiary described in section 68-10-201(4), Idaho Code, is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one (1) distribution of

assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset. [I.C., § 68-10-202, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Relationship to prior acts. Section 202 retains the concept in Section 5(b)(2) of the 1962 Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions

from terminating trusts; and it extends these rules to gain or loss realized from the disposition of assets during administration, an omission in the 1962 Act that has been noted by several commentators. See, e.g., Richard B. Covey, *Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions* 91 (4th ed. 1998); Thomas H. Cantrill, *Fractional or Percentage Residuary Bequests: Allocation of Postmortem Income, Gain and Unrealized Appreciation*, 10 Prob. Notes 322, 327 (1985).

#### PART 3. APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST

**68-10-301. When right to income begins and ends.** — (a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms



of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income. [I.C., § 68-10-301, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Period during which there is no beneficiary. The purpose of the second part of subsection (d) is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example,

if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 302 and 303 apply accordingly if the terms of the trust do not contain different provisions.

**68-10-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.** — (a) A trustee shall allocate an income receipt or disbursement other than one to which section 68-10-201(1), Idaho Code, applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this chapter. Distributions to shareholders or other owners from an entity to which section 68-10-401, Idaho Code, applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration



date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals. [I.C., § 68-10-302, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Prior Acts. Professor Bogert stated that "Section 4 of the [1962] Act makes a change with respect to the apportionment of the income of trust property not due until after the trust began but which accrued in part before the commencement of the trust. It treats such income as to be credited entirely to the income account in the case of a living trust, but to be apportioned between capital and income in the case of a testamentary trust. The [1931] Act apportions such income in the case of both types of trusts, except in the case of corporate dividends." George G. Bogert, *The Revised Uniform Principal and Income Act*, 38 *Notre Dame Law* 50, 52 (1962). The 1962 Act also provides that an asset passing to an inter vivos trust by a bequest in the settlor's will is governed by the rule that applies to a testamentary trust, so that different rules apply to assets passing to an inter vivos trust depending upon whether they were transferred to the trust during the settlor's life or by his will.

Having several different rules that apply to similar transactions is confusing. In order to simplify administration, Section 302 applies the same rule to inter vivos trusts (revocable and irrevocable), testamentary trusts, and assets that become subject to an inter vivos trust by a testamentary bequest.

Periodic payments. Under Section 302, a periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such

as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned. This is the original common law rule. Edwin A. Howes, Jr., *The American Law Relating to Income and Principal* 70 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash from the decedent's securities portfolio, this rule will help to maintain payments to the spouse at the same level as before the settlor's death. Under the 1962 Act, the pre-death portion of the first periodic payment due after death is apportioned to principal in the case of a testamentary trust or securities bequeathed by will to an inter vivos trust.

Nonperiodic payments. Under the second sentence of Section 302(b), interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, would be apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the accrued interest passes under Section 201(1) to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under Section 406.

**68-10-303. Apportionment when income interest ends.** — (a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its trustor relating to income, gift, estate, or other tax requirements. [I.C., § 68-10-303, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Prior Acts. Both the 1931 Act (Section 4) and the 1962 Act (Section 4(d)) provide that a deceased income beneficiary's estate is entitled to the undistributed income. The Drafting Committee concluded that this is probably not what most settlors would want, and that, with respect to undistributed income, most settlors would favor the income beneficiary first, the remainder beneficiaries second, and the income beneficiary's heirs last, if at all. However, it decided not to eliminate this provision to avoid causing disputes about whether the trustee should have distributed collected cash before the income beneficiary died.

Accrued periodic payments. Under the prior Acts, an income beneficiary or his estate is entitled to receive a portion of any payments, other than dividends, that are due or that have accrued when the income interest terminates. The last sentence of subsection (a) changes that rule by providing that such items are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued.

Example — accrued periodic payments. The rules in Section 302 and Section 303 work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under Section 302(a), the July 20 payment is added to the principal of the successive income interest when received. Under Section 302(b), the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under Section

303, neither the income beneficiary of the terminated income interest nor the beneficiary's estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

Beneficiary with an unqualified power to revoke. The requirement in subsection (b) to pay undistributed income to a mandatory income beneficiary or her estate does not apply to the extent the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. Without this exception, subsection (b) would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust.

If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all of the principal that she is permitted to withdraw, a trustee is not required to pay her or her estate the undistributed income attributable to the portion of the principal that she left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment that she has been given or has not withdrawn the assets because she is willing to have the principal and undistributed income be distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay to her or her estate the undistributed income from the 75% that she cannot withdraw.

#### PART 4. ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST

**68-10-401. Character of receipts.** — (a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which section 68-10-402, Idaho Code, applies, a business or activity to which section 68-10-413, Idaho Code, applies, or an asset-backed



security to which section 68-10-415, Idaho Code, applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) Property other than money;

(2) Money received in one (1) distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) Money received in total or partial liquidation of the entity; and

(4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subsection (d)(2) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors. [I.C., § 68-10-401, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Entities to which Section 401 applies. The reference to partnerships in Section 401(a) is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.

Capital gain dividends. Under the Internal Revenue Code and the Income Tax Regulations, a "capital gain dividend" from a mutual fund or real estate investment trust is the excess of the fund's or trust's net long-term capital gain over its net short-term capital loss. As a result, a capital gain dividend does not include any net short-term capital gain, and cash received by a trust because of a net

short-term capital gain is income under this Act.

Reinvested dividends. If a trustee elects (or continues an election made by its predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would be principal. Making or continuing such an election would be equivalent to deciding under Section 104 to transfer income to principal in order to comply with Section 103(b). However, if the trustee makes or continues the election for a reason other than to comply with Section 103(b), e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

Distribution of property. The 1962 Act describes a number of types of property that would be principal if distributed by a corpo-



ration. This becomes unwieldy in a section that applies to both corporations and all other entities. By stating that principal includes the distribution of any property other than money, Section 401 embraces all of the items enumerated in Section 6 of the 1962 Act as well as any other form of nonmonetary distribution not specifically mentioned in that Act.

**Partial liquidations.** Under subsection (d)(1), any distribution designated by the entity as a partial liquidating distribution is principal regardless of the percentage of total assets that it represents. If a distribution exceeds 20% of the entity's gross assets, the entire distribution is a partial liquidation under subsection (d)(2) whether or not the entity describes it as a partial liquidation. In determining whether a distribution is greater than 20% of the gross assets, the portion of the distribution that does not exceed the amount of income tax that the trustee or a beneficiary must pay on the entity's taxable income is ignored.

**Other large distributions.** A cash distribu-

tion may be quite large (for example, more than 10% but not more than 20% of the entity's gross assets) and have characteristics that suggest it should be treated as principal rather than income. For example, an entity may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or because it sold a business asset other than one held for sale to customers in the normal course of its business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, 90% of which would have been allocated to principal if the trust had owned the assets directly. In such a case the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under Section 104(a) to make an adjustment between income and principal, subject to the limitations in Section 104(c).

**68-10-402. Distribution from trust or estate.** — A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, section 68-10-401 or 68-10-415, Idaho Code, applies to a receipt from the trust. [I.C., § 68-10-402, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Terms of the distributing trust or estate. Under Section 103(a), a trustee is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this Act. However, in determining whether a distribution from another trust or an estate is income or principal, the trustee should also determine what the terms of the distributing trust or estate say about the distribution—for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust. Such a provision should override the terms of this Act, but if the terms of the recipient trust contain a provision re-

quiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

**Investment trusts.** An investment entity to which the second sentence of this section applies includes a mutual fund, a common trust fund, a business trust or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset-backed security arrangements to which Section 415 applies. See John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

**68-10-403. Business and other activities conducted by trustee.** — (a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general

accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

- (1) Retail, manufacturing, service and other traditional business activities;
- (2) Farming;
- (3) Raising and selling livestock and other animals;
- (4) Management of rental properties;
- (5) Extraction of minerals and other natural resources;
- (6) Timber operations; and
- (7) Activities to which section 68-10-414, Idaho Code, applies. [I.C., § 68-10-403, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Purpose and scope. The provisions in Section 403 are intended to give greater flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly-owned corporation (or, where permitted by state law, a single-member limited liability company), and to facilitate the trustee's ability to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a trustee to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, and activities in derivatives and options as though they were held by a separate entity. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of this Act that apply to such securities.

Section 403 permits the trustee to account separately for each business or activity for which the trustee determines separate accounting is appropriate. A trustee with a computerized accounting system may account

for these activities in a "subtrust"; an individual trustee may continue to use the business and record-keeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The intent of this section is to give the trustee broad authority to select business record-keeping methods that best suit the activity in which the trustee is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 403 applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest's winding up period, none of the proceeds would be income for purposes of Section 201.

Separate accounts. A trustee may or may not maintain separate bank accounts for business activities that are accounted for under Section 403. A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued a decedent's business practices,



may continue the same banking arrangements that were used during the decedent's lifetime. In either case, the trustee is authorized to decide to what extent cash is to be

retained as part of the business assets and to what extent it is to be transferred to the trust's general accounts, either as income or principal.

**68-10-404. Principal receipts.** — A trustee shall allocate to principal:

(1) To the extent not allocated to income under this chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this part;

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in section 68-10-502(a)(7), Idaho Code, or for other reasons to the extent not based on the loss of income;

(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) Other receipts as provided in sections 68-10-408 through 68-10-415, Idaho Code. [I.C., § 68-10-404, as added by 2001, ch. 261, § 2, p. 943.]

**Official Comment**

Eminent domain awards. Even though the award in an eminent domain proceeding may include an amount for the loss of future rent

on a lease, if that amount is not separately stated the entire award is principal. The rule is the same in the 1931 and 1962 Acts.

**68-10-405. Rental property.** — To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount. [I.C., § 68-10-405, as added by 2001, ch. 261, § 2, p. 943.]

**Official Comment**

Application of Section 403. This section applies to the extent that the trustee does not account separately under Section 403 for the management of rental properties owned by the trust.

Receipts that are capital in nature. A portion of the payment under a lease may be a reimbursement of principal expenditures for

improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 405, a transfer from income to reimburse principal may be appropriate under Section 504 to the extent that some of the "rent" is really a reimbursement



for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 104(b) in deciding whether and to what extent to make an adjustment be-

tween principal and income under Section 104(a) after considering the return from the portfolio as a whole.

**68-10-406. Obligation to pay money.** — (a) An amount received as interest, whether determined at a fixed, variable or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one (1) year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one (1) year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust must be allocated to income.

(c) This section does not apply to an obligation to which section 68-10-409, 68-10-410, 68-10-411, 68-10-412, 68-10-414 or 68-10-415, Idaho Code, applies. [I.C., § 68-10-406, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Variable or floating interest rates. The reference in subsection (a) to variable or floating interest rate obligations is intended to clarify that, even though an obligation's interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money containing a variable or floating rate provision is subject to this section and is not to be treated as a derivative financial instrument under Section 414.

Discount obligations. Subsection (b) applies to all obligations acquired at a discount, including short-term obligations such as U.S. Treasury Bills, long-term obligations such as U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest during part, but not all, of the period before maturity. Under subsection (b), the entire increase in value of these obligations is principal when the trustee receives the proceeds from the disposition unless the obligation, when acquired, has a maturity of less than one year. In order to have one rule that applies to all

discount obligations, the Act eliminates the provision in the 1962 Act for the payment from principal of an amount equal to the increase in the value of U.S. Series E bonds. The provision for bonds that mature within one year after acquisition by the trustee is derived from the Illinois act. 760 ILCS 15/8 (1996).

Subsection (b) also applies to inflation-indexed bonds—any increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than one year after the trustee acquires it; if it matures within one year, all of the increase, including any attributable to an inflation adjustment, is income.

Effect of Section 104. In deciding whether and to what extent to exercise the power to adjust between principal and income granted by Section 104(a), a relevant factor for the trustee to consider is the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

**68-10-407. Insurance policies and similar contracts.** — (a) Except as otherwise provided in subsection (b) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from

income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income or, subject to section 68-10-403, Idaho Code, loss of profits from a business.

(c) This section does not apply to a contract to which section 68-10-409, Idaho Code, applies. [I.C., § 68-10-407, as added by 2001, ch. 261, § 2, p. 943.]

**68-10-408. Insubstantial allocations not required.** — If a trustee determines that an allocation between principal and income required by section 68-10-409, 68-10-410, 68-10-411, 68-10-412 or 68-10-415, Idaho Code, is insubstantial, the trustee may allocate the entire amount to principal unless one (1) of the circumstances described in section 68-10-104(c), Idaho Code, applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in section 68-10-104(d), Idaho Code, and may be released for the reasons and in the manner described in section 68-10-104(e), Idaho Code. An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period. [I.C., § 68-10-408, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

This section is intended to relieve a trustee from making relatively small allocations while preserving the trustee's right to do so if an allocation is large in terms of absolute dollars.

For example, assume that a trust's assets, which include a working interest in an oil well, have a value of \$1,000,000; the net income from the assets other than the working interest is \$40,000; and the net receipts from the working interest are \$400. The trustee may allocate all of the net receipts from the working interest to principal instead of allocating 10%, or \$40, to income under Section 411. If the net receipts from the working interest are \$35,000, so that the amount allocated to income under Section 411 would be \$3,500, the trustee may decide that this amount is sufficiently significant to the in-

come beneficiary that the allocation provided for by Section 411 should be made, even though the trustee is still permitted under Section 408 to allocate all of the net receipts to principal because the \$3,500 would increase the net income of \$40,000, as determined before making an allocation under Section 411, by less than 10%. Section 408 will also relieve a trustee from having to allocate net receipts from the sale of trees in a small woodlot between principal and income.

While the allocation to principal of small amounts under this section should not be a cause for concern for tax purposes, allocations are not permitted under this section in circumstances described in Section 104(c) to eliminate claims that the power in this section has adverse tax consequences.

**68-10-409. Deferred compensation, annuities, and similar payments.** — (a) In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one (1) or more individuals because of services rendered or property transferred to the



payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which section 68-10-410, Idaho Code, applies. [I.C., § 68-10-409, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Scope. Section 409 applies to amounts received under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to the payer. While the right to receive such payments is a liquidating asset of the kind described in Section 410 (i.e., "an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration"), these payment rights are covered separately in Section 409 because of their special characteristics.

Section 409 applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treatment), and insurance renewal commissions. It applies to a retirement plan to

which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and "private annuities" arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock (in-kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of subsection (c)).

The 1962 Act. Under Section 12 of the 1962 Act, receipts from "rights to receive payments on a contract for deferred compensation" are allocated to income each year in an amount not in excess of 5% per year "of the property's inventory value. While "not in excess of 5%" suggests that the annual allocation may range from zero to 5% of the inventory value,



in practice the rule is usually treated as prescribing a 5% allocation. The inventory value is usually the present value of all the future payments, and since the inventory value is determined as of the date on which the payment right becomes subject to the trust, the inventory value, and thus the amount of the annual income allocation, depends significantly on the applicable interest rate on the decedent's date of death. That rate may be much higher or lower than the average long-term interest rate. The amount determined under the 5% formula tends to become fixed and remain unchanged even though the amount received by the trust increases or decreases.

**Allocations Under Section 409(b).** Section 409(b) applies to plans whose terms characterize payments made under the plan as dividends, interest, or payments in lieu of dividends or interest. For example, some deferred compensation plans that hold debt obligations or stock of the plan's sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with "phantom" shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment. Under Section 409(b), payments of dividends, interest or payments in lieu of dividends or interest under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

Section 409(b) does not apply to an IRA or an arrangement with payment provisions similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section 409(c).

**Allocations Under Section 409(c).** The focus of Section 409, for purposes of allocating payments received by a trust to or between principal and income, is on the payment right rather than on assets that may be held in a fund from which the payments are made. Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction (a situation that is provided for in Section 409(d)). An IRA is

subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust.

An amount received from an IRA or a plan with a payment provision similar to that of an IRA is allocated under Section 409(c), which differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules or, in the case of a plan that is not subject to those rules, under the terms of the plan), 10% of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset; Section 409 follows the rule in Section 404(2), which provides that money or property received from a change in the form of a principal asset be allocated to principal.

Section 409(c) produces an allocation to income that is similar to the allocation under the 1962 Act formula if the annual payments are the same throughout the payment period, and it is simpler to administer. The amount allocated to income under Section 409 is not dependent upon the interest rate that is used for valuation purposes when the decedent dies, and if the payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

**Marital deduction requirements.** When an IRA is payable to a QTIP marital deduction trust, the IRS treats the IRA as separate terminable interest property and requires that a QTIP election be made for it. In order to qualify for QTIP treatment, an IRS ruling states that all of the IRA's income must be distributed annually to the QTIP marital deduction trust and then must be allocated to trust income for distribution to the spouse. Rev. Rul. 89-89, 1989-2 C.B. 231. If an allocation to income under this Act of 10% of the required distribution from the IRA does not meet the requirement that all of the IRA's income be distributed from the trust to the spouse, the provision in subsection (d) re-

quires the trustee to make a larger allocation to income to the extent necessary to qualify for the marital deduction. The requirement of Rev. Rul. 89-89 should also be satisfied if the IRA beneficiary designation permits the spouse to require the trustee to withdraw the necessary amount from the IRA and distribute it to her, even though the spouse never actually requires the trustee to do so. If such a provision is in the beneficiary designation, a distribution under subsection (d) should not be necessary.

Application of Section 104. Section 104(a) of this Act gives a trustee who is acting under the prudent investor rule the power to adjust from principal to income if, considering the portfolio as a whole and not just receipts from deferred compensation, the trustee determines that an adjustment is necessary. See Example (5) in the Comment following Section 104.

**68-10-410. Liquidating asset.** — (a) In this section, “liquidating asset” means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right and right to receive payments during a period of more than one (1) year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to section 68-10-409, Idaho Code, resources subject to section 68-10-411, Idaho Code, timber subject to section 68-10-412, Idaho Code, an activity subject to section 68-10-414, Idaho Code, an asset subject to section 68-10-415, Idaho Code, or any asset for which the trustee establishes a reserve for depreciation under section 68-10-503, Idaho Code.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal. [I.C., § 68-10-410, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Prior Acts. Section 11 of the 1962 Act allocates receipts from “property subject to depletion” to income in an amount “not in excess of 5%” of the asset’s inventory value. The 1931 Act has a similar 5% rule that applies when the trustee is under a duty to change the form of the investment. The 5% rule imposes on a trust the obligation to pay a fixed annuity to the income beneficiary until the asset is exhausted. Under both the 1931 and 1962 Acts the balance of each year’s receipts is added to principal. A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if

the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 410 abandons the annuity approach under the 5% rule.

Lottery payments. The reference in subsection (a) to rights to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements covered by Section 409.

**68-10-411. Minerals, water and other natural resources.** — (a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

- (1) If received as nominal delay rental or nominal annual rent on a lease, a receipt must be allocated to income;



(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal;

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent (90%) must be allocated to principal and the balance to income;

(4) If an amount is received from a working interest or any other interest not provided for in paragraph (1), (2) or (3) of this subsection, ninety percent (90%) of the net amount received must be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent (90%) of the amount must be allocated to principal and the balance to income.

(c) This chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water or other natural resources on the effective date of this chapter, the trustee may allocate receipts from the interest as provided in this chapter or in the manner used by the trustee before the effective date of this chapter. If the trust acquires an interest in minerals, water or other natural resources after the effective date of this chapter, the trustee shall allocate receipts from the interest as provided in this chapter. [I.C., § 68-10-411, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Prior Acts. The 1962 Act allocates to principal as a depletion allowance, 27-½% of the gross receipts, but not more than 50% of the net receipts after paying expenses. The Internal Revenue Code no longer provides for a 27-½% depletion allowance, although the major oil-producing States have retained the 27-½% provision in their principal and income acts (Texas amended its Act in 1993, but did not change the depletion provision). Section 9 of the 1931 Act allocates all of the net proceeds received as consideration for the "permanent severance of natural resources from the lands" to principal.

Section 411 allocates 90% of the net receipts to principal and 10% to income. A depletion provision that is tied to past or present Code provisions is undesirable because it causes a large portion of the oil and gas receipts to be paid out as income. As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted.

Application of Sections 403 and 408. This section applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under Section 403 or allocate all of the receipts to principal under Section 408.

Open mine doctrine. The purpose of Section 411(c) is to abolish the "open mine doctrine" as it may apply to the rights of an income beneficiary and a remainder beneficiary in receipts from the production of minerals from land owned or leased by a trust. Instead, such receipts are to be allocated to or between principal and income in accordance with the provisions of this Act. For a discussion of the open mine doctrine, see generally 3A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 239.3 (4th ed. 1988), and *Nutter v. Stockton*, 626 P.2d 861 (Okla. 1981).

Effective date provision. Section 9(b) of the 1962 Act provides that the natural resources provision does not apply to property interests held by the trust on the effective date of the Act, which reflects concerns about the constitutionality of applying a retroactive administrative provision to interests in real estate,



based on the opinion in the Oklahoma case of *Franklin v. Margay Oil Corporation*, 153 P.2d 486, 501 (Okla. 1944). Section 411(d) permits a trustee to use either the method provided for in this Act or the method used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may conclude that retroactivity is not a problem as to property situated in their States, and this provision permits trustees to decide, based on advice from counsel in States whose law may be different from that of Oklahoma, whether they may apply this provision retroactively if they conclude that to do so is in the best interests of the beneficiaries.

If the property is in a State other than the State where the trust is administered, the trustee must be aware that the law of the

property's situs may control this question. The outcome turns on a variety of questions: whether the terms of the trust specify that the law of a State other than the situs of the property shall govern the administration of the trust, and whether the courts will follow the terms of the trust; whether the trust's asset is the land itself or a leasehold interest in the land (as it frequently is with oil and gas property); whether a leasehold interest or its proceeds should be classified as real property or personal property, and if as personal property, whether applicable state law treats it as a movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 648, at 531, 533-534; § 657, at 600 (4th ed. 1989).

**68-10-412. Timber.** — (a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

- (1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;
  - (2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;
  - (3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in paragraphs (1) and (2) of this subsection; or
  - (4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to paragraph (1), (2) or (3) of this subsection.
- (b) In determining net receipts to be allocated pursuant to subsection (a) of this section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.
- (c) This chapter applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.
- (d) If a trust owns an interest in timberland on the effective date of this chapter, the trustee may allocate net receipts from the sale of timber and related products as provided in this chapter or in the manner used by the trustee before the effective date of this chapter. If the trust acquires an interest in timberland after the effective date of this chapter, the trustee shall allocate net receipts from the sale of timber and related products as provided in this chapter. [I.C., § 68-10-412, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Scope of section. The rules in Section 412 are intended to apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (a) applies to net receipts from property owned by the trustee and property leased by the trustee. The Act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (a), the amount of net receipts allocated to income depends upon whether the amount of timber removed is more or less than the rate of growth. The

method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved.

Application of Sections 403 and 408. This section applies to the extent that the trustee does not account separately for net receipts from the sale of timber and related products under Section 403 or allocate all of the receipts to principal under Section 408. The option to account for net receipts separately under Section 403 takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust.

**68-10-413. Property not productive of income.** — (a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under section 68-10-104, Idaho Code, and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by section 68-10-104(a), Idaho Code. The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period. [I.C., § 68-10-413, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Prior Acts' Conflict with Uniform Prudent Investor Act. Section 2(b) of the Uniform Prudent Investor Act provides that "[a] trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole ... ." The underproductive property provisions in Section 12 of the 1962 Act and Section 11 of the 1931 Act give the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as "delayed income." In each Act the provision applies on an asset by asset basis and not by taking into

consideration the trust portfolio as a whole, which conflicts with the basic precept in Section 2(b) of the Prudent Investor Act. Moreover, in determining the amount of delayed income, the prior Acts do not permit a trustee to take into account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under Section 104(b)(7) of this Act, a trustee must consider prior distributions of principal to the income beneficiary in deciding whether and to what extent to



exercise the power to adjust conferred by Section 104(a).

Duty to make property productive of income. In order to implement the Uniform Prudent Investor Act, this Act abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary's right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under Section 104 of this Act.

Trusts for which the value of the right to receive income is important for tax reasons may be affected by Reg. § 1.7520-3(b)(2)(v) Example (1), § 20.7520-3(b)(2)(v) Examples (1) and (2), and § 25.7520-3(b)(2)(v) Examples (1) and (2), which provide that if the income beneficiary does not have the right to compel the trustee to make the property productive, the income interest is considered unproductive and may not be valued actuarially under those sections.

Marital deduction trusts. Subsection (a) draws on language in Reg. § 20.2056(b)-5(f)(4) and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state law is unclear about the spouse's right to compel the trustee to make property produc-

tive of income. The trustee should also consider the application of Section 104 of this Act and the provisions of Restatement of Trusts 3d: Prudent Investor Rule § 240, at 186, app. § 240, at 252 (1992). Example (6) in the Comment to Section 104 describes a situation involving the payment from income of carrying charges on unproductive real estate in which Section 104 may apply.

Once the two conditions have occurred — insufficient beneficial enjoyment from the property and the spouse's demand that the trustee take action under this section — the trustee must act; but instead of the formulaic approach of the 1962 Act, which is triggered only if the trustee sells the property, this Act permits the trustee to decide whether to make the property productive of income, convert it, transfer funds from principal to income, or to take some combination of those actions. The trustee may rely on the power conferred by Section 104(a) to adjust from principal to income if the trustee decides that it is not feasible or appropriate to make the property productive of income or to convert the property. Given the purpose of Section 413, the power under Section 104(a) would be exercised to transfer principal to income and not to transfer income to principal.

Section 413 does not apply to a so-called "estate" trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies. Reg. § 20.2056(c)-2(b)(1)(iii).

**68-10-414. Derivatives and options.** — (a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which give a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under section 68-10-403, Idaho Code, for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a trustor of the trust for services



rendered, must be allocated to principal. [I.C., § 68-10-414, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Scope and application. It is difficult to predict how frequently and to what extent trustees will invest directly in derivative financial instruments rather than participating indirectly through investment entities that may utilize these instruments in varying degrees. If the trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under Section 401 and not Section 414. If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under Section 403; if a trustee chooses not to account under Section 403, Section 414(b) provides the default rule. Certain types of option transactions in which trustees may engage are dealt with in subsection (c) to distinguish those transactions from ones involving options that are embedded in derivative financial instruments.

Definition of "derivative." "Derivative" is a difficult term to define because new derivatives are invented daily as dealers tailor their terms to achieve specific financial objectives for particular clients. Since derivatives are typically contract-based, a derivative can probably be devised for almost any set of objectives if another party can be found who is willing to assume the obligations required to meet those objectives.

The most comprehensive definition of derivative is in the Exposure Draft of a Proposed Statement of Financial Accounting Standards titled "Accounting for Derivative and Similar Financial Instruments and for Hedging Activities," which was released by the Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162-B). The definition in Section 414(a) is derived in part from the FASB definition. The purpose of the definition in subsection (a) is to implement the substantive rule in subsection (b) that provides for all receipts and disbursements to be allocated to principal to the extent the trustee elects not to account for transactions in derivatives under Section 403. As a result, it is much shorter, than the FASB definition, which serves much more ambitious objectives.

A derivative is frequently described as including futures, forwards, swaps and options, terms that also require definition, and the definition in this Act avoids these terms.

FASB used the same approach, explaining in paragraph 65 of the Exposure Draft:

The definition of derivative financial instrument in this Statement includes those financial instruments generally considered to be derivatives, such as forwards, futures, swaps, options, and similar instruments. The Board considered defining a derivative financial instrument by merely referencing those commonly understood instruments, similar to paragraph 5 of Statement 119, which says that "... a derivative financial instrument is a futures, forward, swap, or option contract, or other financial instrument with similar characteristics." However, the continued development of financial markets and innovative financial instruments could ultimately render a definition based on examples inadequate and obsolete. The Board, therefore, decided to base the definition of a derivative financial instrument on a description of the common characteristics of those instruments in order to accommodate the accounting for newly developed derivatives. (Footnote omitted.)

Marking to market. A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act — only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust's principal and income accounts.

Receipt of property other than cash. If a trustee receives property other than cash upon the settlement of a derivatives transaction, that property would be principal under Section 404(2).

Options. Options to which subsection (c) applies include an option to purchase real estate owned by the trustee and a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes. Subsection (c) would also apply to a continuing and regular practice of selling call options on securities owned by the trust if the terms of the option require delivery of the securities. It does not apply if the consideration received or given for the option is something other than cash or property, such as cross-options granted in a buy-sell agreement between owners of an entity.

**68-10-415. Asset-backed securities.** — (a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives

the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which section 68-10-401 or 68-10-409, Idaho Code, applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one (1) or more payments in exchange for the trust's entire interest in an asset-backed security in one (1) accounting period, the trustee shall allocate the payments to principal. If a payment is one (1) of a series of payments that will result in the liquidation of the trust's interest in the security over more than one (1) accounting period, the trustee shall allocate ten percent (10%) of the payment to income and the balance to principal. [I.C., § 68-10-415, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Scope of section. Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset-backed security includes an "interest only" or a "principal only" security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset-backed security, or only the principal payments made on those collateral assets. An asset-backed security also includes a security that permits the investor to participate in

either the capital appreciation of an underlying security or in the interest or dividend return from such a security, such as the "Primes" and "Scores" issued by Americus Trust. An asset-backed security does not include an interest in a corporation, partnership, or an investment trust described in the Comment to Section 402, whose assets consist significantly or entirely of investment assets. Receipts from an instrument that do not come within the scope of this section or any other section of the Act would be allocated entirely to principal under the rule in Section 103(a)(4), and the trustee may then consider whether and to what extent to exercise the power to adjust in Section 104, taking into account the return from the portfolio as whole and other relevant factors.

#### PART 5. ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST

**68-10-501. Disbursements from income.** — A trustee shall make the following disbursements from income to the extent that they are not disbursements to which section 68-10-201(2)(B) or (2)(C), Idaho Code, applies:

(1) One-half ( $\frac{1}{2}$ ) of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half ( $\frac{1}{2}$ ) of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recur-



ring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset. [I.C., § 68-10-501, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

**Trustee fees.** The regular compensation of a trustee or the trustee's agent includes compensation based on a percentage of either principal or income or both.

**Insurance premiums.** The reference in paragraph (4) to "recurring" premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a

principal asset. Title insurance premiums would be a principal disbursement under Section 502(a)(5).

**Regularly recurring taxes.** The reference to "regularly recurring taxes assessed against principal" includes all taxes regularly imposed on real property and tangible and intangible personal property.

**68-10-502. Disbursements from principal.** — (a) A trustee shall make the following disbursements from principal:

- (1) The remaining one-half (½) of the disbursements described in section 68-10-501(1) and (2), Idaho Code;
- (2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution or termination, and disbursements made to prepare property for sale;
- (3) Payments on the principal of a trust debt;
- (4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;
- (5) Premiums paid on a policy of insurance not described in section 68-10-501(4), Idaho Code, of which the trust is the owner and beneficiary;
- (6) Estate, inheritance and other transfer taxes, including penalties, apportioned to the trust; and
- (7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws, rules or regulations and other payments made to comply with those laws, rules or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation. [I.C., § 68-10-502, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

**Environmental expenses.** All environmental expenses are payable from principal, sub-

ject to the power of the trustee to transfer funds to principal from income under Section



504. However, the Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 502(a)(7) on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 403. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act's approach regarding receipts — when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 504(a) and 504(b)(5), a trustee who makes or expects to make a principal disbursement for an environmental

expense described in Section 502(a)(7) is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 502(a)(7) is based upon the definition of an "environmental remediation trust" in Treas. Reg. § 301.7701-4(e) (as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

Title proceedings. Disbursements that are made to protect a trust's property, referred to in Section 502(a)(4), include an "action to assure title" that is mentioned in Section 13(c)(2) of the 1962 Act.

Insurance premiums. Insurance premiums referred to in Section 502(a)(5) include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the insurance policy. There is no provision in the 1962 Act for life insurance premiums.

Taxes. Generation-skipping transfer taxes are payable from principal under subsection (a)(6).

### **68-10-503. Transfers from income to principal for depreciation.**

— (a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion or gradual obsolescence of a fixed asset having a useful life of more than one (1) year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under section 68-10-403, Idaho Code, for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund. [I.C., § 68-10-503, as added by 2001, ch. 261, § 2, p. 943.]

### **Official Comment**

Prior Acts. The 1931 Act has no provision for depreciation. Section 13(a)(2) of the 1962

Act provides that a charge shall be made against income for "... a reasonable allowance

for depreciation on property subject to depreciation under generally accepted accounting principles ... ” That provision has been resisted by many trustees, who do not provide for any depreciation for a variety of reasons. One reason relied upon is that a charge for depreciation is not needed to protect the remainder beneficiaries if the value of the land is increasing; another is that generally accepted accounting principles may not require depreciation to be taken if the property is not part of a business. The Drafting Committee concluded that the decision to provide for depreciation should be discretionary with the trustee. The power to transfer funds from

income to principal that is granted by this section is a discretionary power of administration referred to in Section 103(b), and in exercising the power a trustee must comply with Section 103(b).

One purpose served by transferring cash from income to principal for depreciation is to provide funds to pay the principal of an indebtedness secured by the depreciable property. Section 504(b)(4) permits the trustee to transfer additional cash from income to principal for this purpose to the extent that the amount transferred from income to principal for depreciation is less than the amount of the principal payments.

**68-10-504. Transfers from income to reimburse principal.** — (a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one (1) or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) of this section applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

- (1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;
- (2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;
- (3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements and broker’s commissions;
- (4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and
- (5) Disbursements described in section 68-10-502(a)(7), Idaho Code.

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a) of this section. [I.C., § 68-10-504, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

Prior Acts. The sources of Section 504 are Section 13(b) of the 1962 Act, which permits a trustee to “regularize distributions,” if charges against income are unusually large, by using “reserves or other reasonable means” to withhold sums from income distributions; Section 13(c)(3) of the 1962 Act, which authorizes a trustee to establish an allowance for depreciation out of income if principal is used for extraordinary repairs, capital improvements and special assessments; and Section

12(3) of the 1931 Act, which permits the trustee to spread income expenses of unusual amount “throughout a series of years.” Section 504 contains a more detailed enumeration of the circumstances in which this authority may be used, and includes in subsection (b)(4) the express authority to use income to make principal payments on a mortgage if the depreciation charge against income is less than the principal payments on the mortgage.



**68-10-505. Income taxes.** — (a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

(1) From income to the extent that receipts from the entity are allocated to income; and

(2) From principal to the extent that:

(A) Receipts from the entity are allocated to principal; and

(B) The trust's share of the entity's taxable income exceeds the total receipts described in paragraphs (1) and (2)(A) of this subsection.

(d) For purposes of this section, receipts allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax. [I.C., § 68-10-505, as added by 2001, ch. 261, § 2, p. 943.]

#### Official Comment

**Electing Small Business Trusts.** An Electing Small Business Trust (ESBT) is a creature created by Congress in the Small Business Job Protection Act of 1996 (P.L. 104-188). For years beginning after 1996, an ESBT may qualify as an S corporation stockholder even if the trustee does not distribute all of the trust's income annually to its beneficiaries. The portion of an ESBT that consists of the S corporation stock is treated as a separate trust for tax purposes (but not for trust accounting purposes), and the S corporation income is taxed directly to that portion of the trust even if some or all of that income is distributed to the beneficiaries.

A trust normally receives a deduction for distributions it makes to its beneficiaries. Subsection (d) takes into account the possibility that an ESBT may not receive a deduction for trust accounting income that is distributed to the beneficiaries. Only limited guidance has been issued by the Internal Revenue Service, and it is too early to anticipate all of the technical questions that may arise, but the powers granted to a trustee in Sections 506 and 104 to make adjustments are probably sufficient to enable a trustee to correct inequities that may arise because of technical problems.

**68-10-506. Adjustments between principal and income because of taxes.** — (a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) Elections and decisions, other than those described in subsection (b) of this section, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving, or a distribution from, the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust or beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate



tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust or beneficiary are decreased, each estate, trust or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income. [I.C., § 68-10-506, as added by 2001, ch. 261, § 2, p. 943.]

### Official Comment

Discretionary adjustments. Section 506(a) permits the fiduciary to make adjustments between income and principal because of tax law provisions. It would permit discretionary adjustments in situations like these: (1) A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust's federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain. See generally Joel C. Dobris, *Limits on the Doctrine of Equitable Adjustment in Sophisticated Post-mortem Tax Planning*, 66 Iowa L. Rev. 273 (1981).

Section 506(a)(3) applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation's taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary's tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation's taxable income includes capital gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders.

Mandatory adjustment. Subsection (b) pro-

vides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It is derived from New York's EPTL § 11-1.2(A), which requires principal to be reimbursed by those who benefit when a fiduciary elects to deduct administration expenses on an income tax return instead of the estate tax return. Unlike the New York provision, subsection (b) limits a mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. It is intended to preserve the result reached in *Estate of Britenstool v. Commissioner*, 46 T.C. 711 (1966), in which the Tax Court held that a reimbursement required by the predecessor of EPTL § 11-1.2(A) resulted in the estate receiving the same charitable contributions deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax benefit from the deduction is \$30,000 and the estate tax benefit would have been \$20,000, principal will be reimbursed \$20,000 and the net benefit to the income beneficiaries will be \$10,000.

Irrevocable grantor trusts. Under Sections 671-679 of the Internal Revenue Code (the "grantor trust" provisions), a person who creates an irrevocable trust for the benefit of another person may be subject to tax on the

trust's income or capital gains, or both, even though the settlor is not entitled to receive any income or principal from the trust. Because this is now a well-known tax result, many trusts have been created to produce this result, but there are also trusts that are unintentionally subject to this rule. The Act does not require or authorize a trustee to distribute funds from the trust to the settlor in these cases because it is difficult to establish a rule that applies only to trusts where this tax result is unintended and does not apply to trusts where the tax result is intended. Settlers who intend this tax result rarely state it as an objective in the terms of

the trust, but instead rely on the operation of the tax law to produce the desired result. As a result it may not be possible to determine from the terms of the trust if the result was intentional or unintentional. If the drafter of such a trust wants the trustee to have the authority to distribute principal or income to the settlor to reimburse the settlor for taxes paid on the trust's income or capital gains, such a provision should be placed in the terms of the trust. In some situations the Internal Revenue Service may require that such a provision be placed in the terms of the trust as a condition to issuing a private letter ruling.

## PART 6. MISCELLANEOUS PROVISIONS

**68-10-601. Uniformity of application and construction.** — In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. [I.C., § 68-10-601, as added by 2001, ch. 261, § 2, p. 943.]

**68-10-602. Severability clause.** — If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [I.C., § 68-10-602, as added by 2001, ch. 261, § 2, p. 943.]

**68-10-603, 68-10-604. [Reserved.]**

**68-10-605. Application of chapter to existing trusts and estates.** — This chapter applies to every trust or decedent's estate existing on the effective date of this chapter except as otherwise expressly provided in the will or terms of the trust or in this chapter. [I.C., § 68-10-605, as added by 2001, ch. 261, § 2, p. 943.]

## CHAPTER 11

### UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT

#### SECTION.

68-1101. [Repealed.]

68-1102 — 68-1104. [Obsolete.]

**68-1101. Testamentary additions to trust. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised S.L. 1963, ch. 182, § 1, was re-

pealed by S.L. 1971, ch. 111, § 8. For new law see § 15-2-511.

**68-1102 — 68-1104. Effect on prior wills. [Obsolete.]****STATUTORY NOTES**

**Compiler's Notes.** — These sections, § 1 (§ 68-1101) of said act, by S.L. 1971, ch. which comprised S.L. 1963, ch. 182, §§ 2-4, 111, § 8. are deemed obsolete by virtue of the repeal of

**CHAPTER 12****PRIVATE FOUNDATIONS AND CHARITABLE TRUSTS****SECTION.**

68-1201. Trusts covered by law.

68-1202. Provisions prohibited in trust instruments.

68-1203. Required distributions.

68-1204. Trustee may amend governing instrument under certain circumstances.

**SECTION.**

68-1205. Courts and attorney general not impaired.

68-1206. References to Internal Revenue Code of 1986.

68-1207. Trust instruments or private foundation articles may provide that this law will not apply.

**68-1201. Trusts covered by law.** — This act shall apply only to trusts which are “private foundations” as defined in section 509 of the Internal Revenue Code of 1986, “charitable trusts” as described in section 4947(a)(1) of the Internal Revenue Code of 1986 and “split-interest trusts” as described in section 4947(a)(2) of the Internal Revenue Code of 1986. [1974, ch. 73, § 1, p. 1154; am. 1994, ch. 190, § 1, p. 617.]

**STATUTORY NOTES**

**Federal References.** — Provisions of the Internal Revenue Code referred to in this chapter are compiled throughout 26 U.S.C. Sections 509 and 4947 are compiled as 26

U.S.C., §§ 509 and 4947 respectively.

**Compiler's Notes.** — The words “this act” refer to S.L. 1974, ch. 73 compiled as §§ 68-1201 — 68-1203, 68-1205 — 68-1207.

**68-1202. Provisions prohibited in trust instruments.** — The trust instrument of each trust to which this act applies shall be deemed to contain provisions prohibiting the trustee from:

(a) Engaging in any act of “self-dealing” (as defined in section 4941(d) of the Internal Revenue Code of 1986), which would give rise to any liability for the tax imposed by section 4941(a) of the Internal Revenue Code of 1986;

(b) Retaining any “excess business holdings” (as defined in section 4943(c) of the Internal Revenue Code of 1986), which would give rise to any liability for the tax imposed by section 4943(a) of the Internal Revenue Code of 1986;

(c) Making any investments which would jeopardize the carrying out of any of the exempt purposes of the trust, within the meaning of section 4944 of the Internal Revenue Code of 1986, so as to give rise to any liability for the tax imposed by section 4944(a) of the Internal Revenue Code of 1986; and

(d) Making any “taxable expenditures” (as defined in section 4945(d) of the Internal Revenue Code of 1986), which would give rise to any liability for the tax imposed by section 4945(a) of the Internal Revenue Code of 1986;

Provided, that this section shall not apply either to those split-interest trusts or to amounts thereof which are not subject to the prohibitions



applicable to private foundations by reason of the provisions of section 4947 of the Internal Revenue Code of 1986. [1974, ch. 73, § 2, p. 1154; am. 1994, ch. 190, § 2, p. 617.]

#### STATUTORY NOTES

**Federal References.** — Sections 4941, 4943, 4944, 4945 and 4947 of the Internal Revenue Code referred to in this section are compiled as 26 U.S.C., §§ 4941, 4943, 4944, 4945 and 4947.

**Compiler's Notes.** — The words "this act" refer to S.L. 1974, ch. 73 compiled as §§ 68-1201 — 68-1203, 68-1205 — 68-1207.

#### RESEARCH REFERENCES

**Am. Jur.** — 15 Am. Jur. 2d, Charities, § 4 et seq.

**C.J.S.** — 80 C.J.S., Trusts, § 15.

**68-1203. Required distributions.** — The trust instrument of each trust to which this act applies, except "split-interest" trusts, shall be deemed to contain a provision requiring the trustee to distribute, for the purposes specified in the trust instrument, for each taxable year of the trust, amounts at least sufficient to avoid liability for the tax imposed by section 4942(a) of the Internal Revenue Code of 1986. [1974, ch. 73, § 3, p. 1154; am. 1994, ch. 190, § 3, p. 617.]

#### STATUTORY NOTES

**Federal References.** — Section 4942 of the Internal Revenue Code referred to in this section is compiled as 26 U.S.C., § 4942.

**Compiler's Notes.** — The words "this act" refer to S.L. 1974, ch. 73 compiled as §§ 68-1201 — 68-1203, 68-1205 — 68-1207.

**68-1204. Trustee may amend governing instrument under certain circumstances.** — The trustee of a trust may, with the prior consent of the attorney general, amend the terms of the governing instrument to the extent necessary:

(a) To assure conformity of the governing instrument with the requirements for exemption from the taxes imposed in sections 4941 to 4945 of the Internal Revenue Code of 1986, including amendments which broaden, extend, reduce or limit the charitable purposes for which the trust is administered;

(b) To terminate the status of the trust as a private foundation in a manner described in section 507(b)(1) of the Internal Revenue Code of 1986; or

(c) To terminate the trust and transfer its assets to one (1) or more entities described in section 501(c)(3) of the Internal Revenue Code of 1986 because continuation is impractical due to its small size or impractical because of changed circumstances adversely impacting its purpose or purposes.

Prior to giving consent, the attorney general shall determine that the proposed amendments are necessary or appropriate to achieve the charitable purposes of the trust. If the trust is for the exclusive benefit of one (1) or

more charitable organizations, or in the event there are one (1) or more residual beneficiaries, the trustee shall also obtain the prior consent of such organizations or individuals prior to amending the terms of the governing instrument in the manner set forth in this section. Further, notwithstanding the provisions of section 68-1201, Idaho Code, this section shall additionally apply to all trusts described in section 501(c)(3) of the Internal Revenue Code of 1986. [I.C. § 68-1204, as added by 1994, ch. 190, § 5, p. 617.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 68-1204, which comprised 1974, ch. 73, § 4, p. 1154, was repealed by S.L. 1994, ch. 190, § 4, effective July 1, 1994.

**Federal References.** — Sections

501(c)(3), 507(b)(1), and 4941 to 4945 of the Internal Revenue Code of 1986, referred to throughout this section, are compiled as 26 U.S.C. §§ 501(c)(3), 507(b)(1), and 4941 to 4945, respectively.

**68-1205. Courts and attorney general not impaired.** — Nothing in this act shall impair the rights and powers of the courts or the attorney general of this state with respect to any trust. [1974, ch. 73, § 5, p. 1154.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1974, ch. 73 compiled as §§ 68-1201 — 68-1203, 68-1205 — 68-1207.

**68-1206. References to Internal Revenue Code of 1986.** — All references to sections of the Internal Revenue Code of 1986 shall refer to that term as it is now and hereafter defined in section 63-3004, Idaho Code. [1974, ch. 73, § 6, p. 1154; am. 1994, ch. 190, § 6, p. 617.]

#### STATUTORY NOTES

**Federal References.** — The Internal Revenue Code of 1986 is codified as 26 U.S.C. § 1 et seq.

**68-1207. Trust instruments or private foundation articles may provide that this law will not apply.** — Nothing in this act shall limit the power of a person who creates a trust or the power of a person who has retained or has been granted the right to amend a trust to include a specific provision in the trust instrument or an amendment thereto which provides that some or all of the provisions of this act shall have no application to such trust. [1974, ch. 73, § 7, p. 1154; am. 1994, ch. 190, § 7, p. 617.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1974, ch. 73 compiled as §§ 68-1201 — 68-1203, 68-1205 — 68-1207.

Section 8 of S.L. 1974, ch. 73, read: "The provisions of this act are hereby declared to be severable and if any provision of this act or

the application of such provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

**Effective Dates.** — Section 9 of S.L. 1974, ch. 73 declared an emergency, and also pro-

vided that the act would be in full force and effect on and after its passage and approval,

and retroactive to January 1, 1974. Approved March 21, 1974.

## CHAPTER 13

### IDAHO UNIFORM CUSTODIAL TRUST ACT

#### SECTION.

- 68-1301. Definitions.
- 68-1302. Custodial trust — General.
- 68-1303. Custodial trustee for future payment or transfer.
- 68-1304. Form and effect of receipt and acceptance by custodial trustee — Jurisdiction.
- 68-1305. Transfer to custodial trustee by fiduciary or obligor — Facility of payment.
- 68-1306. Multiple beneficiaries — Separate custodial trusts — Survivorship.
- 68-1307. General duties of custodial trustee.
- 68-1308. General powers of custodial trustee.
- 68-1309. Use of custodial trust property.
- 68-1310. Determination of incapacity — Effect.
- 68-1311. Exemption of third person from liability.

#### SECTION.

- 68-1312. Liability to third person.
- 68-1313. Declination, resignation, incapacity, death, or removal of custodial trustee — Designation of successor custodial trustee.
- 68-1314. Expenses, compensation and bond of custodial trustee.
- 68-1315. Reporting and accounting by custodial trustee — Determination of liability of custodial trustee.
- 68-1316. Limitations of action against custodial trustee.
- 68-1317. Distribution on termination.
- 68-1318. Methods and forms for creating custodial trusts.
- 68-1319. Applicable law.
- 68-1320. Uniformity of application and construction.
- 68-1321. Short title.
- 68-1322. Severability.

### COMMENT TO OFFICIAL TEXT

#### PREFATORY NOTE

This Uniform Act provides for the creation of a statutory custodial trust for adults to be governed by the provisions of the Act whenever property is delivered to another "as custodial trustee under the (Enacting state) Uniform Custodial Trust Act." The provisions of this Act are based on trust analogies to concepts developed and used in establishing custodianships for minors under the Uniform Transfers to Minors Act (UTMA). The Custodial Trust Act is designed to provide a statutory standby inter vivos trust for individuals who typically are not very affluent or sophisticated, and possibly represented by attorneys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity. The statute will also be available for accomplishing distribution of funds by judgment debtors and others to incapacitated persons for whom a conservator has not been appointed. Since this Act allows any person, competent to transfer property, to create custodial trusts for the benefit of themselves or others, with the beneficial interest in custodial trust property in the beneficiary and not in the custodial trustee, its potential for use is extensive. Although the most frequent use probably will be by elderly persons, it is also available for a parent to establish a custodial trust for an adult child who may be incapacitated; for adult persons in the military, or those leaving the country temporarily, to place their property with another for management without relinquishing beneficial ownership of their property; or for young people who have received property under the Uniform Transfers to Minors Act to continue a custodial trust as adults in order to obtain the benefit and convenience of management services performed by the custodial trustee.

This Act follows the approach taken by the Uniform Transfers to Minors Act and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodial trustee for the benefit of a beneficiary. However, the most typical transaction envisioned would involve a person who would transfer intangible property, such as securities or bank accounts, to a custodial trustee but with retention by the transferor of direction over the property. Later, this direction could be relinquished, or it could be lost upon incapacity. The objective of the statute is to provide a simple trust that is uncomplicated in its creation, administration, and termination. The potential for tax problems is minimized by permitting



the beneficiary in most instances to retain control while the beneficiary has capacity to manage the assets effectively. The statute contains an asset specific transfer provision that it is believed will be simple to use and will gain the acceptance of the securities and financial industry. A simple transfer document, examples of which are set forth in the Act, and a receipt from the custodian, also in the Act, would provide for identification of beneficiaries or distributees upon death of the beneficiary. Protection is extended to third parties dealing with the custodian. Although the Act is patterned on the Uniform Transfers to Minors Act and meshes into the Uniform Probate Code, it is appropriate for enactment as well in states which have not adopted either UTMA or the UPC.

An adult beneficiary, who is not incapacitated, may: (1) terminate the custodial trust on demand (Section 2(e)); (2) receive so much of the income or custodial property as he or she may request from time to time (Section 9(a)); and (3) give the custodial trustee binding instructions for investment or management (Section 7(b)). In the absence of direction by the beneficiary, who is not incapacitated, the custodial trustee manages the property subject to the standard of care that would be observed by a prudent person dealing with the property of another and is not limited by other statutory restrictions on investments by fiduciaries (Section 7).

A principal feature of the Custodial Trust under this Act is designed to protect the beneficiary and his or her dependents against the perils of the beneficiary's possible future incapacity without the necessity of a conservatorship. Under Section 10, the incapacity of the beneficiary does not terminate (1) the custodial trust, (2) the designation of a successor custodial trustee, (3) any power or authority of the custodial trustee, or (4) the immunities of third persons relying on actions of the custodial trustee. The custodial trustee continues to manage the property as a discretionary trust under the prudent person standard for the benefit of the incapacitated beneficiary.

Means of monitoring and enforcing the custodial trust include provisions requiring the custodial trustee to keep the beneficiary informed, requiring accounting by the custodial trustee (Section 15), providing for removal of the custodial trustee (Section 13), and the distribution of the assets on termination of the custodial trust (Section 17). The custodial trustee is protected in Section 16 by the statutes of limitation on proceedings against the custodial trustee.

Transactions with the custodial trustee should be executed readily and quickly by third parties because their rights and protections are determined by the Act and a third party acting in good faith has no need to determine the custodial trustee's authority to bind the beneficiary with respect to property and investment matters (Section 11). The Act generally limits the claims of third parties to recourse against the custodial property, with the beneficiary insulated against personal liability unless he or she is personally at fault and the custodial trustee is similarly insulated unless the custodial trustee is personally at fault or failed to disclose the custodial capacity when entering into a contract (Section 12).

As a consequence of the mobility of our population, particularly the mature persons who are most likely to utilize this Act, uniformity of the laws governing custodial trusts is highly desirable, and the Act is designed to avoid conflict of laws problems. A custodial trust created under this Act remains subject to this Act despite a subsequent change in the residence of the transferor, the beneficiary, or the custodial trustee or the removal of the custodial trust property from the state of original location (Section 19).

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**68-1301. Definitions.** — As used in this chapter:

- (1) "Adult" means an individual who is at least eighteen (18) years of age.
- (2) "Beneficiary" means an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit under this chapter.
- (3) "Conservator" means a person appointed or qualified by a court to manage the estate of an individual or a person legally authorized to perform substantially the same functions.
- (4) "Court" means the district court of this state.
- (5) "Custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under this chapter and the income from and proceeds of that interest.

(6) "Custodial trustee" means a person designated as trustee of a custodial trust under this chapter or a substitute or successor to the person designated.

(7) "Guardian" means a person appointed or qualified by a court as a guardian of an individual, including a limited guardian, but not a person who is only a guardian ad litem.

(8) "Incapacitated" means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, minority, or other disabling cause.

(9) "Legal representative" means a personal representative or conservator.

(10) "Member of the beneficiary's family" means a beneficiary's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

(12) "Personal representative" means an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same functions, or a successor to any of them.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(14) "Transferor" means a person who creates a custodial trust by transfer or declaration.

(15) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers. [I.C., § 68-1301, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

(1) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2053(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long as possible. The difference has little or no practical consequence and serves the purpose of each Act.

(3) "Conservator" is defined broadly to per-

mit identification of a person functioning as a conservator.

(4) "Court" means \_\_\_\_\_ court. Here the likelihood is that most states would utilize the same court, e.g., the probate court, that deals with conservators and estates.

(5 and 6) The terms, "custodial trust property" and "custodial trustee," are used throughout to identify clearly the statutory trust property and trustee under this Act. The statutory trust concept is used throughout the Act.

(7) A definition of guardian has been included and is based on the Uniform Probate Code Section 5-103(6).

(8) A definition of incapacitated has been included, for the purpose of this Act, because incapacity of the beneficiary converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-401(c) relating to the person who is unable to manage property.



Compare Uniform Probate Code Section 5-103(7). Note that Section 10(a)(ii) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 10 deals specifically with the determination of incapacity.

(10) The beneficiary's family is broadly defined to identify persons who may have stand-

ing to seek judicial intervention or accounting (Sections 13 and 15).

(11) The definition of a person is taken from the Uniform Probate Code Section 1-201(29).

(12) Personal representative is broadly defined and the definition reflects that in the Uniform Probate Code Section 1-201(30).

**68-1302. Custodial trust — General.** — (1) A person may create a custodial trust of property by a written transfer of the property to another person, evidenced by registration or by other instrument of transfer, executed in any lawful manner, naming as beneficiary, an individual who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the Idaho uniform custodial trust act.

(2) A person may create a custodial trust of property by a written declaration, evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and naming as beneficiary an individual other than the declarant, in which the declarant as titleholder is designated, in substance, as custodial trustee under the Idaho uniform custodial trust act. A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under this chapter.

(3) Title to custodial trust property is in the custodial trustee and the beneficial interest is in the beneficiary.

(4) Except as provided in subsection (5) of this section, a transferor may not terminate a custodial trust.

(5) The beneficiary, if not incapacitated, or the conservator of an incapacitated beneficiary may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or conservator declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(6) Any person may augment existing custodial trust property by the addition of other property pursuant to this chapter.

(7) The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

(8) This chapter does not displace or restrict other means of creating trusts. A trust whose terms do not conform to this chapter may be enforceable according to its terms under other law. [I.C., § 68-1302, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

Section 2 is the principal provision authorizing the creation of a custodial trust and utilizes the concept of incorporation by reference when the transferee or titleholder of property is designated as custodial trustee under the Act. Section 2 sets forth the general effect of such a transfer. Section 18 provides forms which satisfy the requirements of this section and identifies customary methods of transferring assets to create a custodial trust.

Section 2(a) provides that a trust may be created by transfer to another for the benefit of the transferor or another. This is expected to be the most common way in which a custodial trust would be created. However, a custodial trust may also be created by declaration of trust by the owner of property to hold it for the benefit of another as is provided in Section 2(b). A declaration in trust by the owner of property for the sole benefit of the



owner is not contemplated by this Act because such an attempt may be considered ineffective as a trust due to the total identity of the trustee and beneficiary. However, the doctrine of merger would not preclude an effective transfer under this Act for the benefit of the transferor and one or more other beneficiaries. See Section 6.

A custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property as one of the transfers "consistent with law."

These alternatives permit the major uses of the custodial trust to be accomplished expeditiously. For example, an older person, wishing to be relieved of management of property may transfer property to another for benefit of the transferor or of the transferor's spouse or child. The declaration may be used to establish a trust of which the owner is trustee to continue management of the property for benefit of another, such as a spouse or child. The trust may include a provision for distribution of assets remaining at the beneficiary's death directly to a named distributee.

This Act does not preclude the creation of trusts under other existing law, statutory or nonstatutory, but is designed to facilitate the creation of simple trusts incorporating the provisions of this Act. The written transfer or declaration "consistent with law" requires that the formalities of the transfer of particular property necessary under other law will be observed, e.g., if land is involved, the requirements of a proper deed and recording must be satisfied.

Section 2(c) provides for the retention of the beneficial interest in the custodial trust property in the beneficiary and, of course, not in the custodial trustee. The extensive control and benefit in the beneficiary who is not incapacitated maintains the simplicity of the trust and avoids tax complexity. The custodial trustee is given the title to the property and authority to act with regard to the property only as is authorized by the statute. The

custodial trustee's powers are enumerated in Section 8.

Section 2(e) gives the adult beneficiary, who is not incapacitated, the power to terminate the custodial trust at any time during his or her lifetime. This power of termination exists in any beneficiary who is not incapacitated whether the beneficiary was or was not the transferor. A beneficiary may be determined to be incapacitated or the transferor may designate that the trust is to be administered as a trust for an incapacitated beneficiary under Section 10, in which event the beneficiary does not have the power to terminate. However, the designation of incapacity by the transferor can be modified by the trustee or the court by reason of changed circumstances pursuant to Section 10. The Act precludes termination by exercise of a durable power of attorney if the beneficiary is incompetent (Section 7(f)). If the donor prefers not to permit the beneficiary the power to terminate or to designate the beneficiary as incapacitated under Section 10, an individually drafted trust outside the scope of this Act would seem appropriate.

Upon termination of a custodial trust, the custodial trust property must be distributed as provided in Section 17.

A transfer under this Act is irrevocable except to the extent the beneficiary may terminate it. Hence, a transfer to a trustee for benefit of a person other than the transferor is not revocable by the transferor. If a power of revocation were retained by the transferor, that would be a trust outside the scope of this Act and enforceable under general law pursuant to subsection 2(h).

This Act does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act.

### **68-1303. Custodial trustee for future payment or transfer. —**

(1) A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by: "as custodial trustee for (name of beneficiary) under the Idaho uniform custodial trust act."

(2) Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

(3) A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a

power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right. [I.C., § 68-1303, as added by 1989, ch. 230, § 1, p. 547.]

COMMENT TO OFFICIAL TEXT

This section permits a future custodial trustee to be designated to receive property for the beneficiary of a custodial trust to be effective upon the occurrence of a future event or transfer. To accommodate changes in circumstances during the passage of time, one or more successors or substitute custodial trustees can also be designated. The designation of the future custodial trustee and the beneficiary can be made in an instrument which is revocable or irrevocable depending upon the nature of the transaction or transfer. Any person designated as a future custodial

trustee may decline to serve before the transfer occurs or may resign under Section 13 after the transfer.

The source of this section is Section 3 of UTMA.

The enacting state's rule against perpetuities may limit or affect the creation of a custodial trust upon the occurrence of a future event, but because the use of a custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise.

**68-1304. Form and effect of receipt and acceptance by custodial trustee — Jurisdiction.** — (1) Obligations of a custodial trustee, including the obligation to follow directions of the beneficiary, arise under this chapter upon the custodial trustee's acceptance, express or implied, of the custodial trust property.

(2) The custodial trustee's acceptance may be evidenced by a writing stating in substance: CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

I, (name of custodial trustee) acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act. I undertake to administer and distribute the custodial trust property pursuant to the Idaho Uniform Custodial Trust Act. My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is, or becomes incapacitated. The custodial trust property consists of \_\_\_\_\_.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Custodial Trustee)

(3) Upon accepting custodial trust property, a person designated as custodial trustee under this chapter is subject to personal jurisdiction of the court with respect to any matter relating to the custodial trust. [I.C., § 68-1304, as added by 1989, ch. 230, § 1, p. 547.]

COMMENT TO OFFICIAL TEXT

Although a custodial trust is created by a transfer that satisfies Section 2 of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the

custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act. The acceptance can be expressed or implied, but it is recommended that the written acceptance provided for in Section 4(b) be



utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial

trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

**68-1305. Transfer to custodial trustee by fiduciary or obligor — Facility of payment.** — (1) Unless otherwise directed by an instrument designating a custodial trustee pursuant to section 68-1303, Idaho Code, a person including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds twenty thousand dollars (\$20,000), the transfer is not effective unless authorized by the court.

(2) A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section. [I.C., § 68-1305, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section is in the nature of a facility-of-payment provision that permits persons owing money to an incapacitated individual to discharge a fixed obligation by a payment to a custodial trustee under this Act. The section does not authorize the custodial trustee to settle claims for disputed amounts but only to acknowledge an effective receipt of property paid or delivered. It is based primarily on

Sections 6 and 7 of UTMA and includes the protections of Section 8 of UTMA as well. It permits a custodial trust to be established as a substitute for a conservatorship to receive payments due an incapacitated individual. Also, see Section 11, which protects transferors and other third parties dealing with the custodial trustee.

**68-1306. Multiple beneficiaries — Separate custodial trusts — Survivorship.** — (1) Beneficial interests in a custodial trust created for multiple beneficiaries are deemed to be separate custodial trusts of equal undivided interests for each beneficiary. Except in a transfer or declaration for use and benefit of husband and wife, for whom survivorship is presumed, a right of survivorship does not exist unless the instrument creating the custodial trust specifically provides for survivorship or survivorship is required as to community or marital property.

(2) Custodial trust property held under this chapter by the same custodial trustee for the use and benefit of the same beneficiary may be administered as a single custodial trust.

(3) A custodial trustee of custodial trust property held for more than one (1) beneficiary shall separately account to each beneficiary pursuant to sections 68-1307 and 68-1315, Idaho Code, for the administration of the custodial trust. [I.C., § 68-1306, as added by 1989, ch. 230, § 1, p. 547.]



## COMMENT TO OFFICIAL TEXT

This Act, unlike UTMA, does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each beneficiary are separate and the custodial trustee is obligated under subsection (c) to account separately to each ben-

eficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (b) allows a custodial trustee who is administering multiple custodial trusts for the same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitated beneficiary, the custodial trustee can administer them as a single custodial trust.

**68-1307. General duties of custodial trustee.** — (1) If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

(2) If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property. In the absence of effective contrary direction by the beneficiary while not incapacitated, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other law restricting investments by fiduciaries. However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor. If a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall use that skill or expertise.

(3) Subject to subsection (2) of this section, a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

(4) A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is so identified if an appropriate instrument so identifying the property is recorded, and custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance: "as custodial trustee for (name of beneficiary) under the Idaho uniform custodial trust act."

(5) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

(6) The exercise of a durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust. [I.C., § 68-1307, as added by 1989, ch. 230, § 1, p. 547.]

**COMMENT TO OFFICIAL TEXT**

Subsection (b) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the beneficiary has not directed him. Under Sections 9 and 10, when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken from Section

7-302 of the Uniform Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section is taken from Section 12 of UTMA. Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section is entitled "general duties" because there are additional specific duties identified in other sections such as Section 9.

**68-1308. General powers of custodial trustee.** — (1) A custodial trustee, acting in a fiduciary capacity, has all the rights and powers over custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.

(2) The provisions of this section do not relieve a custodial trustee from liability for a violation of section 68-1307, Idaho Code. [I.C., § 68-1308, as added by 1989, ch. 230, § 1, p. 547.]

**COMMENT TO OFFICIAL TEXT**

This section is taken from Section 13 of UTMA. It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act. An alternative approach to subsection (a) that might be taken by an

enacting state is to refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [(a) A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

**68-1309. Use of custodial trust property.** — (1) A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

(2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

(3) A custodial trustee may establish checking, savings, or other similar accounts of reasonable amounts under which either the custodial trustee or the beneficiary may withdraw funds from, or draw checks against, the accounts. Funds withdrawn from, or checks written against, the account by the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary. [I.C., § 68-1309, as added by 1989, ch. 230, § 1, p. 547.]



## COMMENT TO OFFICIAL TEXT

This section provides that the custodial trustee is obligated to follow the directions of the beneficiary who is not incapacitated in paying over or expending custodial trust property. If the beneficiary is incapacitated, this section imposes duties on the custodial trustee to apply funds for the beneficiary similar to those imposed on custodians for minors under Section 14 of UTMA. In addition, however, subsection (b) authorizes a custodial trustee to pay over or expend custodial trust property for the use and benefit of the incapacitated beneficiary's dependents who were supported by the beneficiary at the time the beneficiary became incapacitated or for whom there is a legal obligation to support.

The use-and-benefits standard for the expenditure of custodial property is intended to avoid any implication that the custodial trust property can be used only for the required support of the incapacitated beneficiary.

Subsection (c) allows a custodial trustee to

maintain a bank account, of an amount reasonable under the circumstances, with the beneficiary whereby both the beneficiary and the custodial trustee may write checks on the account. This may be used as one method of making money available for the beneficiary's personal needs. Many incapacitated persons, unable to manage business affairs, are still competent to pay personal expenses. This type of arrangement would be important to them. A custodial trustee should maintain, of course, a separate bank account for use in managing the custodial trust property and investments.

An alternative approach might be taken to this section that refers to the distributive powers of a conservator under the laws of the enacting state, in the event that state should prefer that incorporation by reference. For example: [The custodial trustee has the distributive powers of a conservator under the Uniform Probate Code.]

**68-1310. Determination of incapacity — Effect.** — (1) The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if (i) the custodial trust was created under section 68-1305, Idaho Code, (ii) the transferor has so directed in the instrument creating the custodial trust, or (iii) the custodial trustee has determined that the beneficiary is incapacitated.

(2) A custodial trustee may determine that the beneficiary is incapacitated in reliance upon (i) previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney, (ii) the certificate of the beneficiary's physician, or (iii) other persuasive evidence.

(3) If a custodial trustee for an incapacitated beneficiary reasonably concludes that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.

(4) On petition of the beneficiary, the custodial trustee, or other person interested in the custodial trust property or the welfare of the beneficiary, the court shall determine whether the beneficiary is incapacitated.

(5) Absent determination of incapacity of the beneficiary under subsection (2) or (4) of this section, a custodial trustee who has reason to believe that the beneficiary is incapacitated shall administer the custodial trust in accordance with the provisions of this chapter applicable to an incapacitated beneficiary.

(6) Incapacity of a beneficiary does not terminate (i) the custodial trust, (ii) any designation of a successor custodial trustee, (iii) rights or powers of the custodial trustee, or (iv) any immunities of third persons acting on



instructions of the custodial trustee. [I.C., § 68-1310, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This is one of the more important sections of the Act under which the custodial trustee may determine that the beneficiary is incapacitated so the trust will change from one subject to the control of the beneficiary to a discretionary trust for the beneficiary. Subsection (b) allows the custodial trustee to determine that the beneficiary is incapacitated provided the determination is based upon the certificate of the beneficiary's physician, the prior direction or authority of the beneficiary, or other reasonable evidence. That authority could be evidenced, for example, by a durable power of attorney executed by the beneficiary prior to becoming incapacitated even though that power of attorney is not otherwise effective to control management or termination of the custodial trust. Such a durable power of attorney could be given to a child, spouse, friend, or other trusted individual. In addition, specific authority is provided in subsection (d) for the beneficiary, the custodial trustee, or other interested person to seek a declaration from the court as to the capacity of the beneficiary for the purposes of this Act. This is important

to the custodial trustee, as his duties and responsibilities change on the event of the beneficiary's incapacity.

This section is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appointment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

This section also does not provide a proceeding to attack the legal competence of a transferor in setting up a trust under Section 2. Rather, Section 10 relates to a management matter in a validly established custodial trust.

Subsection (f) provides that the incapacity of the beneficiary does not terminate the custodial trust. If the beneficiary becomes incapacitated, the authority of the custodial trustee continues and the custodial trustee must follow the statutory provisions of the Act relating to managing custodial trusts for incapacitated individuals.

**68-1311. Exemption of third person from liability.** — A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or purporting to act in the capacity of, a custodial trustee. In the absence of knowledge to the contrary, the third person is not responsible for determining:

- (1) The validity of the purported custodial trustee's designation;
- (2) The propriety of, or the authority under this chapter for, any action of the purported custodial trustee;
- (3) The validity or propriety of an instrument executed or instruction given pursuant to this chapter either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or
- (4) The propriety of the application of property vested in the purported custodial trustee. [I.C., § 68-1311, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section is based upon Section 16 of the UTMA and protects third persons who deal in good faith with the custodial trustee.

**68-1312. Liability to third person.** — (1) A claim based on a contract entered into by a custodial trustee acting in a fiduciary capacity, an obligation arising from the ownership or control of custodial trust property,

or a tort committed in the course of administering the custodial trust, may be asserted by a third person against the custodial trust property by proceeding against the custodial trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

(2) A custodial trustee is not personally liable to a third person:

(a) On a contract properly entered into in a fiduciary capacity unless the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or

(b) For an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust unless the custodial trustee is personally at fault.

(3) A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

(4) The provisions of subsections (2) and (3) of this section do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary to the extent the person sued is protected as the insured by liability insurance. [I.C., § 68-1312, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section is patterned after Section 17 of the UTMA and that section in turn was based upon Sections 5-428 and 7-306 of the Uniform Probate Code limiting the liability of conservators and trustees. See also Restatement of Trusts, 2d Sections 265 and 277. The effect of this section is to limit the claims of third parties to recourse against custodial trust property as both the custodial trustee and the beneficiary are protected from personal liability absent personal fault on their part. This section does not alter the obligations between the custodial trustee and the beneficiary arising

out of the administration of the estate and the accounting for that administration.

There may be cases in which a custodial trustee or beneficiary may have a right to possession of custodial trust property and may insure against liability arising out of possession or control of the property as a named insured, e.g., under homeowner's or automobile liability insurance. In such a case, the beneficiary should be permitted as a party defendant under subsection (d) but only to the extent of the protection of the liability insurance.

#### **68-1313. Declination, resignation, incapacity, death, or removal of custodial trustee — Designation of successor custodial trustee. —**

(1) Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative. If an event giving rise to a transfer has not occurred, the substitute custodial trustee designated under section 68-1303, Idaho Code, becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to section 68-1303, Idaho Code. In other cases, the transferor or the transferor's legal representative may designate a substitute custodial trustee.

(2) A custodial trustee who has accepted the custodial trust property may resign by (i) delivering written notice to a successor custodial trustee, if any, the beneficiary and, if the beneficiary is incapacitated, to the beneficiary's



conservator, if any, and (ii) transferring or registering, or recording an appropriate instrument relating to, the custodial trust property, in the name of and delivering the records to, the successor custodial trustee identified under subsection (3) of this section.

(3) If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor, designated under section 68-1302 or 68-1303, Idaho Code, becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee. If the beneficiary is incapacitated, or fails to act within ninety (90) days after the ineligibility, resignation, death, or incapacity of the custodial trustee, the beneficiary's conservator becomes the successor custodial trustee. If the beneficiary does not have a conservator or the conservator fails to act, the resigning custodial trustee may designate a successor custodial trustee.

(4) If a successor custodial trustee is not designated pursuant to subsection (3) of this section, the transferor, the legal representative of the transferor or of the custodial trustee, an adult member of the beneficiary's family, the guardian of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to designate a successor custodial trustee.

(5) A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee, as soon as practicable, shall put the custodial trust property and records in the possession and control of the successor custodial trustee. The successor custodial trustee may enforce the obligation to deliver custodial trust property and records and becomes responsible for each item as received.

(6) A beneficiary, the beneficiary's conservator, an adult member of the beneficiary's family, a guardian of the person of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court to remove the custodial trustee for cause and designate a successor custodial trustee, to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or for other appropriate relief. [I.C., § 68-1313, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section follows many of the provisions of Section 18 of UTMA with some substantive changes. It is designed to accommodate in a single section the circumstances in which a custodial trustee would be replaced by another custodial trustee. Under subsection (b), if the beneficiary is incapacitated, a custodial trustee who resigns must give written notice to both the beneficiary and the beneficiary's conservator if one exists. Under subsection (c), a beneficiary who is not incapacitated may designate, without limitation, a successor custodial trustee. If, however, the beneficiary fails to act or is incapacitated, the procedure to be followed is very similar to that found in

UTMA except that the nonincapacitated beneficiary has 90 days to act and if the beneficiary has no conservator or if the conservator declines to act, the custodial trustee may eventually designate a successor custodial trustee.

Under subsection (f), the beneficiary, whether or not incapacitated, can petition the court to remove the custodial trustee for cause and to designate a successor trustee, or the court may require the custodial trustee to give bond or other appropriate relief.

This section, unlike Section 18 of UTMA, does not give the custodial trustee the general power to designate a successor custodial



trustee but rather limits that power to the situation in which the procedure for designating successor custodial trustees by others has been exhausted.

**68-1314. Expenses, compensation and bond of custodial trustee.**

— Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary, or by court order, a custodial trustee:

(1) Is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

(2) Has a noncumulative election, to be made no later than six (6) months after the end of each calendar year, to charge a reasonable compensation for fiduciary services performed during that year; and

(3) Need not furnish a bond or other security for the faithful performance of fiduciary duties. [I.C., § 68-1314, as added by 1989, ch. 230, § 1, p. 547.]

**COMMENT TO OFFICIAL TEXT**

This section follows the pattern of Section 15 of the UTMA except it does not subject the arrangements for payment of expenses, compensation, and bond to provisions in the custodial trust instrument or agreement of the beneficiary or court order.

As in UTMA, the provisions with regard to compensation are designed to avoid imputed compensation to the custodian who waives

compensation and also to avoid the accumulation of claims for compensation until the termination of the custodial trust. Although the ability to control these matters by the trust instrument or agreement of the beneficiary seems to be implied, as was assumed in UTMA, it is here expressly stated because of the possibility of informal arrangements with persons as trustees.

**68-1315. Reporting and accounting by custodial trustee — Determination of liability of custodial trustee.**

— (1) Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement describing the custodial trust property and shall thereafter provide a written statement of the administration of the custodial trust property (i) once each year, (ii) upon request at reasonable times by the beneficiary or the beneficiary's legal representative, (iii) upon resignation or removal of the custodial trustee, and (iv) upon termination of the custodial trust. The statements must be provided to the beneficiary or to the beneficiary's legal representative, if any. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a current statement to the person to whom the custodial trustee property is to be delivered.

(2) A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

(3) A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee.

(4) In an action or proceeding under this chapter or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of final accounts.

(5) If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

(6) On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee for the services of the custodial trustee or others. [I.C., § 68-1315, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section requires that the custodial trustee inform the beneficiary of the initiation of the trust and provide reasonably current reports of the administration of the custodial trust to the beneficiary or the beneficiary's legal representative. Even though some custodial trustees may act informally, it seems appropriate that both the trustee and the beneficiary be expected to exchange complete information concerning the administration of the trust at least once each year. In some cases, more frequent exchanges of information between the custodial trustee and beneficiary would be expected, e.g., when they use a bank account to which both have access. This is particularly true with regard to necessary information for tax reporting by the parties involved. This section assumes the usual minimum components of an account,

i.e., assets and values, at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or available for distribution at the close of the accounting period.

Subsection (a) identifies the necessary reports and accountings for the parties, and subsection (b) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section is drawn from Section 19 of the UTMA modified to fit the custodial trust.

Subsection (f) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph is patterned after Uniform Probate Code Section 7-205.

#### **68-1316. Limitations of action against custodial trustee. —**

(1) Except as provided in subsection (3) of this section, unless previously barred by adjudication, consent, or limitation, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered, or the legal representative of an incapacitated or deceased beneficiary or payee:

(a) Who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two (2) years after receipt of the final account or statement; or

(b) Who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three (3) years after the termination of the custodial trust.

(2) Except as provided in subsection (3) of this section, a claim for relief to recover from a custodial trustee for fraud, misrepresentation, or concealment related to the final settlement of the custodial trust or concealment of the existence of the custodial trust, is barred unless an action or proceeding to assert the claim is commenced within five (5) years after the termination of the custodial trust.

(3) A claim for relief is not barred by this section if the claimant:



- (a) Is a minor, until the earlier of two (2) years after the claimant becomes an adult or dies;
- (b) Is an incapacitated adult, until the earliest of two (2) years after
  - (i) the appointment of a conservator, (ii) the removal of the incapacity, or (iii) the death of the claimant; or
- (c) Was an adult, now deceased, who was not incapacitated, until two (2) years after the claimant's death. [I.C., § 68-1316, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section. The limitations provided in this section are derived from the Uniform Probate Code, Sections 1-106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as required under Section 13 on removal or resignation, or the deceased custodial trustee's personal representative accounts, the two-year limitation of subsec-

tion (a)(1) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (a)(2) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (b) would apply. In any event, should the beneficiary become incapacitated or die before the applicable time limitation had expired, the tolling provision of subsection (c) could postpone the time bar until two years after removal of the disability or death.

**68-1317. Distribution on termination.** — (1) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

- (a) To the beneficiary, if not incapacitated or deceased;
- (b) To the conservator or other recipient designated by the court for an incapacitated beneficiary; or
- (c) Upon the beneficiary's death, in the following order:
  - (i) As last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;
  - (ii) To the survivor of multiple beneficiaries if survivorship is provided for pursuant to section 68-1306, Idaho Code;
  - (iii) As designated in the instrument creating the custodial trust; or
  - (iv) To the estate of the deceased beneficiary.

(2) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.

(3) Death of the beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust. [I.C., § 68-1317, as added by 1989, ch. 230, § 1, p. 547.]



COMMENT TO OFFICIAL TEXT

This section controls distribution of the custodial trust property when the custodial trust is terminated under Section 2(e). It is designed to provide for efficient and certain distribution without judicial proceedings. Subsection (a)(3) is an important provision for avoiding complications on distribution and provides that distribution may be controlled first, by the direction of the deceased beneficiary or second, by the custodial trust instrument (see Sections 2, 6 and 18) and, only if no effective prior designation for the payment or distribution of the property on the death of the beneficiary has been made, shall it pass through the beneficiary's estate. The direction to the custodial trustee by the beneficiary, who is not incapacitated, for distribution on termination of the custodial trust may be in any written form clearly identifying the distributee. For example, the following direction would be adequate under the statute:  
I, \_\_\_\_\_ (name of beneficiary) hereby direct

\_\_\_\_\_ (name of trustee) as custodial trustee, to transfer and pay the unexpended balance of the custodial trust property of which I am beneficiary to \_\_\_\_\_ as distributee on the termination of the trust at my death. In the event of the prior death of \_\_\_\_\_ above named as distributee, I designate \_\_\_\_\_ as distributee of the custodial trust property.  
Signed

(signature)

\_\_\_\_\_  
Beneficiary  
Date \_\_\_\_\_  
Receipt Acknowledged  
(signature)

\_\_\_\_\_  
Custodial Trustee  
Date \_\_\_\_\_

**68-1318. Methods and forms for creating custodial trusts.** — (1) If a transaction, including a declaration with respect to or a transfer of specific property, otherwise satisfies applicable law, the criteria of section 68-1302, Idaho Code, are satisfied by:

(a) The execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

TRANSFER UNDER THE IDAHO  
UNIFORM CUSTODIAL TRUST ACT

I, (name of transferor or name of representative capacity if a fiduciary), transfer to (name of trustee other than transferor), as custodial trustee for (name of beneficiary) as beneficiary and \_\_\_\_\_ as distributee on termination of the trust in absence of direction by the beneficiary under the Idaho Uniform Custodial Trust Act, the following: (insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).  
Dated: \_\_\_\_\_

(Signature); or

(b) The execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

DECLARATION OF TRUST UNDER THE IDAHO UNIFORM  
CUSTODIAL TRUST ACT

I, (name of owner of property), declare that henceforth I hold as custodial trustee for (name of beneficiary other than transferor) as beneficiary and \_\_\_\_\_ as distributee on termination of the trust in absence of direction by the beneficiary under the Idaho Uniform Custodial

Trust Act, the following: (Insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Date: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

(2) Customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including any of the following:

- (a) Registration of a security in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in the substance “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”;
- (b) Delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee accompanied by an instrument in substantially the form prescribed in subsection (1)(a) of this section;
- (c) Payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”;
- (d) Registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”;
- (e) Delivery of a written assignment to an adult other than the transferor or to a trust company whose name in the assignment is designated in substance by the words: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”;
- (f) Irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power, or the donee who holds the power if the beneficiary is other than the donee, whose name in the appointment is designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Act”;
- (g) Delivery of a written notification or assignment of a right to future payment under a contract to an obligor which transfers the right under the contract to a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, whose name in the notification or assignment is designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”;
- (h) Execution, delivery, and recordation of a conveyance of an interest in real property in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”;

(i) Issuance of a certificate of title by an agency of a state or of the United States which evidences title to tangible personal property:

(i) Issued in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”; or

(ii) Delivered to a trust company or an adult other than the transferor or endorsed by the transferor to that person, designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act”; or

(j) Execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance: “as custodial trustee for (name of beneficiary) under the Idaho Uniform Custodial Trust Act.” [I.C., § 68-1318, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section largely follows Section 9 of UTMA. It provides instructional detail for forms and methods of transferring assets that satisfy the requirements of the statute. Although many of the customary methods of transferring assets are identified, these methods are not intended to be exclusive since any type of property that can be transferred by any legal means is intended to be within the scope of the statute, provided the require-

ments of Section 2 are met. The method of transfer or conveyance appropriate to the asset should be used, e.g., if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute as self-contained and as fully explanatory as possible, these provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

**68-1319. Applicable law.** — (1) This chapter applies to a transfer or declaration creating a custodial trust that refers to this chapter if, at the time of the transfer or declaration, the transferor, beneficiary, or custodial trustee is a resident of or has its principal place of business in this state or custodial trust property is located in this state. The custodial trust remains subject to this chapter despite a later change in residence or principal place of business of the transferor, beneficiary, or custodial trustee, or removal of the custodial trust property from this state.

(2) A transfer made pursuant to an act of another state substantially similar to the provisions of this chapter is governed by the law of that state and may be enforced in this state. [I.C., § 68-1319, as added by 1989, ch. 230, § 1, p. 547.]

#### COMMENT TO OFFICIAL TEXT

This section is designed to avoid confusion in the event a party or assets are removed from the state.

**68-1320. Uniformity of application and construction.** — This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. [I.C., § 68-1320, as added by 1989, ch. 230, § 1, p. 547.]



**68-1321. Short title.** — This chapter may be cited as the “Idaho Uniform Custodial Trust Act.” [I.C., § 68-1321, as added by 1989, ch. 230, § 1, p. 547.]

**68-1322. Severability.** — If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable. [I.C., § 68-1322, as added by 1989, ch. 230, § 1, p. 547.]

## CHAPTER 14

### COURT APPROVED PAYMENTS OR AWARDS TO MINORS OR INCOMPETENT PERSONS

#### SECTION.

68-1401. Application.

68-1402. Order directing payment of expenses, costs and fees.

68-1403. Disposition of balance.

#### SECTION.

68-1404. Incompetent persons.

68-1405. Special needs trusts — Requirements — Jurisdiction of court — Court orders.

**68-1401. Application.** — The provisions of this chapter apply when:

(1) A court approves a compromise of a judgment on a disputed claim of a minor or incompetent person, the execution of a release of a claim or covenant not to enforce a judgment on a claim of a minor or incompetent person, a compromise of a pending action or proceeding to which a minor or incompetent person is a party, or when a court awards judgment for a minor or incompetent person; and

(2) The compromise, release, covenant or judgment provides for the payment or delivery of money or property for the benefit of the minor or incompetent person. [I.C., § 68-1401, as added by 1995, ch. 214, § 1, p. 742.]

**68-1402. Order directing payment of expenses, costs and fees.** —

(1) As part of the order approving a compromise, release, covenant or judgment pursuant to this chapter, the court shall also order that the reasonable and necessary expenses of the minor or incompetent person including, but not limited to, medical expenses, reimbursement to a parent, guardian, or conservator, and attorney’s fees and costs approved by the court, shall be paid from the money or property to be paid or delivered for the benefit of the minor or incompetent person.

(2) The order for payment of expenses may be directed to the following:

(a) A parent or guardian of a minor or incompetent person or a guardianship or conservatorship of the estate of a minor or incompetent person; or

(b) The payor of money or property pursuant to the compromise, covenant, or judgment for the benefit of the minor or incompetent person. [I.C., § 68-1402, as added by 1995, ch. 214, § 1, p. 742.]

**68-1403. Disposition of balance.** — (1) If there is no guardianship or conservatorship of the estate of the minor or incompetent person, the

balance of the money or property, after payment of all expenses approved by the court pursuant to this chapter, shall be paid, delivered or deposited in the manner the court determines in its discretion is in the best interest of the minor or incompetent person, including the creation of a special needs trust.

(2) Except as provided in this section, if there is a guardianship or conservatorship of the estate of the minor or incompetent person, the balance of the money or property remaining after payment of expenses approved by the court pursuant to this chapter shall be paid or delivered to the guardian or conservator of the estate.

(3) Upon an ex parte petition filed by the guardian, conservator or any person interested in the guardianship or conservatorship estate, the court making an order or awarding judgment pursuant to this chapter may for good cause shown, order either or both of the following:

(a) That, after payment of expenses, all or part of the balance of money or property shall not become part of the guardianship or conservatorship estate and instead shall be deposited in an insured account in a financial institution in Idaho, or in a single premium deferred annuity, subject to withdrawal only when authorized by the court.

(b) If there exists a guardianship of the estate of the minor, the court may order that, after payment of expenses, all or part of the balance of money or property not become part of the guardianship estate and instead be transferred to a custodian for the benefit of the minor under the Idaho uniform transfers to minors act, chapter 8, title 68, Idaho Code.

(4) Upon a petition by the guardian, conservator, or any person interested in the guardianship or conservatorship estate, the court making an order or awarding judgment pursuant to this chapter may order that, after payment of expenses, all or part of the balance of money or property not become part of the guardianship or conservatorship estate and instead be paid to a special needs trust.

(5) Notice of the time and place of hearing on a petition filed pursuant to this section, and a copy of the petition, shall be mailed to the director of the Idaho department of health and welfare at least fifteen (15) days before the hearing. [I.C., § 68-1403, as added by 1995, ch. 214, § 1, p. 742.]

**68-1404. Incompetent persons.** — References in this chapter to “incompetent person,” shall be deemed to include persons for whom a conservator may be appointed pursuant to section 15-5-401, Idaho Code. [I.C., § 68-1404, as added by 1995, ch. 214, § 1, p. 742.]

**68-1405. Special needs trusts — Requirements — Jurisdiction of court — Court orders.** — (1) If a court orders that money of a minor or incompetent person be paid to a special needs trust, the terms of the trust shall be reviewed and approved by the court and shall satisfy the requirements of this section. The trust shall be subject to the continuing jurisdiction of the court, and is subject to court supervision to the extent determined by the court. The court may transfer jurisdiction to the court in the county where the minor or incompetent person resides.

(2) A special needs trust may be established and continued under this section only if the court determines all of the following:

(a) That the minor or incompetent person has a disability that substantially impairs the individual's ability to provide for the individual's own care or custody and constitutes a substantial handicap;

(b) That the minor or incompetent person is likely to have special needs that will not be met without the trust; and

(c) That money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the minor or incompetent person.

(3) If at any time it appears that:

(a) Any of the requirements of this section are not satisfied or the trustee refuses without good cause to make payments from the trust for the special needs of the beneficiary; and

(b) That the Idaho department of health and welfare or a county or city in this state has a claim against trust property, then the Idaho department of health and welfare, the county or the city may petition the court for an order terminating the trust.

(4) A court order for payment of money or property to a special needs trust shall include a provision that all statutory liens properly perfected at the time of the court's order, and in favor of the Idaho department of health and welfare or any county or city of this state, shall be satisfied first. [I.C., § 68-1405, as added by 1995, ch. 214, § 1, p. 742.]



## TITLE 69

### WAREHOUSES

#### CHAPTER

1. [REPEALED.]
2. BONDED WAREHOUSE LAW, §§ 69-201 — 69-267.
3. [REPEALED.]

#### CHAPTER

4. [REPEALED.]
5. COMMODITY DEALER LAW, §§ 69-501 — 69-526.

### CHAPTER 1

#### UNIFORM WAREHOUSE RECEIPTS LAW

### 69-101 — 69-160. Warehouse receipts. [Repealed.]

#### STATUTORY NOTES

**Prior Laws.** — Section 69-103 was also repealed by S.L. 1957, ch. 25, § 2, p. 31.

**Compiler's Notes.** — These sections, which comprised S.L. 1915, ch. 31, §§ 1-58, 61, p. 85; C.L. 255:1-255:59; C.S., §§ 6119-6177; 1925, ch. 87, §§ 1, 2, p. 122; I.C.A.,

§§ 67-101 — 67-159; 1949, ch. 180, §§ 1, 2, p. 381; 1957, ch. 25, § 1, p. 31; I.C., § 69-160, as added by 1957, ch. 25, § 3, p. 31, were repealed by S.L. 1967, ch. 161, § 10-102, effective at midnight on December 31, 1967. For present law see §§ 28-7-101 — 28-7-704.

### CHAPTER 2

#### BONDED WAREHOUSE LAW

#### SECTION.

- 69-201. Short title of act.
- 69-202. Definitions.
- 69-203. License necessary to operate public warehouse.
- 69-204. Penalty for operating without a license — Misrepresentation.
- 69-205. Inspection and classification of warehouses, storage, warehousing, weighing and certification of commodities — Duties of warehousemen.
- 69-206. Licenses to warehousemen — Issue — Renewal — Conditions precedent.
- 69-207. Term of license — Renewal.
- 69-208. Bond of applicant for license — Additional bond — Additional obligations — Certificate of deposit or irrevocable letter of credit in lieu of bond — Single bond.
- 69-208A. Amount of bond — Cancellation.
- 69-209. Action on bond, certificate of deposit or irrevocable letter of credit by producers injured.
- 69-210. Designation of warehouse as bonded warehouse.
- 69-211. Fees of department.

#### SECTION.

- 69-212. Schedule of charges — Posting.
- 69-213. Privilege of examining commodities stored.
- 69-213A. Annual notification.
- 69-214. Employment of personnel.
- 69-215. Licenses to weigh commodities for storage.
- 69-216. [Repealed.]
- 69-217. Right to assess and collect fees.
- 69-218. Warehousemen to receive commodities according to capacity.
- 69-219. Commodities deemed delivered subject to law.
- 69-220. Inspection and grading of diseased or insect infested commodities.
- 69-221. [Repealed.]
- 69-222. Receipts — Scale weight tickets.
- 69-223. Negotiable warehouse receipts for commodities stored — Contents — Conditions — Penalties.
- 69-224. Standards for agricultural commodities.
- 69-225. Loss of receipts — Conditions of re-issue.
- 69-226. Records of warehouses — Conduct of warehouses.
- 69-227. Examination of commodities or seed

## SECTION.

- crops — Records — Publication of findings.
- 69-228. Suspension or revocation of license.
- 69-229. Publication of reports.
- 69-230. Examination of books — Authorization to copy.
- 69-231. Rules.
- 69-232. Cooperation with governmental agencies and private associations.
- 69-233. Violation of law — Penalty.
- 69-234. Rent of quarters — Employment of assistants.
- 69-235. Effect of partial invalidity of law.
- 69-236. Noncompliance — Failure — Remedies of department.
- 69-237. Partial withdrawal of commodities — Adjustment or substitution of receipt — Duties of warehouseman.
- 69-238. Warehouseman's obligations — Duty to deliver deposited commodities — Damages.
- 69-239. Duties of warehouseman — Contents of records.
- 69-240. Director's discretionary action.
- 69-241. Insurance — Cancellation procedure — Suspension of license.
- 69-242. Injunction.
- 69-243. Duty to prosecute.
- 69-244. License reissuance following revocation.
- 69-245. Director's authority.
- 69-246. Appeals from decision of director.
- 69-247. License denial.
- 69-248. Drawing checks insufficiently covered a violation.

## SECTION.

- 69-249. Credit-sale contracts.
- 69-250. Confidential and protected records.
- 69-251. Payment of purchase price.
- 69-252 — 69-254. [Reserved.]
- 69-255. Short title — Indemnity fund program.
- 69-256. Creation of indemnity fund — Uses.
- 69-257. Assessment — Rate — Minimum and maximum assessment.
- 69-258. Collection and remittance of assessments — Principal amount held in trust — Interest earned — Failure to collect or remit assessments constitutes a violation — Interest and penalties for unpaid assessments.
- 69-259. Funding and limits of fund.
- 69-260. Financial difficulties — Additional bond or security required.
- 69-261. Advisory committee — Terms — Compensation.
- 69-262. Proof of claims — Procedure — Hearing — Inspection of warehouse.
- 69-263. Failure to file — Loss of claim on fund.
- 69-264. Minimum balance — Subsequent payments.
- 69-265. [Repealed.]
- 69-266. Payment from fund — Debt of warehouseman or dealer or surety — Reimbursement — Accrual of cause of action.
- 69-267. Claim against warehouseman or dealer — Director's remedies.

**69-201. Short title of act.** — This act shall be known by the short title of Bonded Warehouse Law. [1919, ch. 152, § 1, p. 484; C.S., § 6178; I.C.A., § 67-201.]

## STATUTORY NOTES

**Cross References.** — Charges for unclaimed goods, § 55-1401 et seq.

Commodity dealer law, §§ 69-501 — 69-525.

**Compiler's Notes.** — The words "this act"

refer to S.L. 1919, ch. 152, which is compiled herein as §§ 69-201 — 69-203, 69-205 — 69-215, 69-218 — 69-220, 69-222 — 69-232, 69-234, 69-235.

## JUDICIAL DECISIONS

## ANALYSIS

Indemnity agreement.  
 Liability for conversion.  
 Purpose of law.  
 Rights acquired.  
 Warehouseman as agent of seller.  
 Warehouse receipt.

### Indemnity Agreement.

Since an action on an indemnity agreement does not accrue until the indemnitor suffers damage or loss, the five-year statute of limitations on written contracts did not bar a warehouse bond surety's action against the warehouseman for indemnification pursuant to a 1964 indemnity agreement, where the surety's action did not accrue until 1973 when the state closed the bonded warehouse. *State Dep't of Agric. v. Millers Nat'l Ins. Co.*, 97 Idaho 323, 543 P.2d 1163 (1975).

Where an application for a grain warehouse bond included an indemnity agreement whereby the applicant warehouseman agreed to indemnify the bond surety for any losses sustained by reason of issuance of the bond, and where a clause in the application provided that the application terms would be applied for every continuation, renewal, substitute or new bond, the warehouseman was therefore bound by the indemnity agreement on the execution of a subsequent bond and annual continuations thereof. *State Dep't of Agric. v. Millers Nat'l Ins. Co.*, 97 Idaho 323, 543 P.2d 1163 (1975).

### Liability for Conversion.

In an action for conversion of wheat against a corporation which operated a warehouse previously operated by a copartnership, but later forfeited its charter, leaving former partners as its reputed directors, officers, and agents, and also against such partners and surety on warehouseman's bond, wherein it was shown that the bond furnished to the corporation was in effect at time of the conversion, error in finding that bond furnished to the partners was then in effect was harmless. *Mitchell v. Munn Whse. Co.*, 59 Idaho 661, 86 P.2d 174 (1938).

An insurance adjuster's unauthorized sale and delivery of wheat stored in warehouse, with acquiescence of the warehouse company, because of a fire in the warehouse, permanently deprived the owner of his property and constituted actionable conversion, for which buyer of wheat, warehouse company and surety on warehouseman's bond were liable. *Mitchell v. Munn Whse. Co.*, 59 Idaho 661, 86 P.2d 174 (1938).

### Purpose of Law.

Purpose of legislature in enactment of Bonded Warehouse Law, this chapter, was to

protect producers of agricultural products from conversion of products after products had been delivered to a warehouse. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), aff'd sub nom., *William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), cert. denied, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

### Rights Acquired.

The Bonded Warehouse Law and the Uniform Warehouse Receipts Law provide that a warehouseman does not acquire any right to the goods delivered except possession. *Jensen v. United States Fid. & Guar. Co.*, 78 Idaho 145, 298 P.2d 976 (1956).

### Warehouseman as Agent of Seller.

Where intervenor sold warehouseman all but 20,000 pounds of his 1954 oats crop for which warehouseman paid by check and both parties agreed that warehouseman should sell remainder of 1954 crop and all of 1955 crop to a prospective buyer but when sale failed to materialize and warehouseman retained the oats and intervenor learned that warehouseman's check had failed to clear the bank intervenor made demand on warehouseman for oats and received two warehouse receipts covering the entire two crops and later check cleared the bank but the receipt for the 1954 crop was neither reduced nor canceled, the evidence was clear that the relationship between the intervenor and the warehouseman was not that of bailor-bailee which normally results from conducting warehouse business but was that of purchaser-seller or that warehouseman was acting as commercial agent or factor for the intervenor. *United States v. Fireman's Fund Ins. Co.*, 191 F. Supp. 317 (D. Idaho 1961).

### Warehouse Receipt.

When a warehouseman received grain for storage, he should have issued a warehouse receipt in a specified form commanding him never to sell or dispose of that particular grain and never to permit it to be removed beyond his custody or control until he received the written assent of the holder of that receipt. *State v. Henzell*, 17 Idaho 725, 107 P. 67 (1910).

**Cited in:** *Jensen v. United States Fid. & Guar. Co.*, 76 Idaho 351, 283 P.2d 185 (1955); *Crown v. State*, 127 Idaho 175, 898 P.2d 1086 (1995); *Crown v. State, Dep't of Agric.*, 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994).

## RESEARCH REFERENCES

**Am. Jur.** — 78 Am. Jur. 2d, Warehouse, § 79 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositories, § 16 et seq.

**A.L.R.** — Validity and construction of contract exempting agricultural fair or similar bailee from liability for articles delivered for exhibition. 69 A.L.R.3d 1025.



**69-202. Definitions.** — As used in this chapter:

(1) "Agricultural commodity" or "commodity" means any grain, wheat, barley, oats, corn, rye, oilseeds, dry edible beans, peas, lentils and other leguminous seeds and feeds (not including minerals or seed crops) or any other commodity as determined by the director.

(2) "Commodity dealer" or "dealer" means any person who solicits, contracts for, or obtains from an Idaho producer or producers, title, possession or control of any agricultural commodity through his place of business located in the state of Idaho or through his place of business located outside the state of Idaho for the purposes of sale or resale or who buys, during a calendar year, at least ten thousand dollars (\$10,000) worth of agricultural commodities from an Idaho producer or producers of the commodities. Commodity dealer or dealer shall not mean any person who purchases agricultural commodities for his own use as seed or feed within his own operation.

(3) "Contract" means a written agreement between two (2) or more parties for the sale of an agricultural commodity stipulating the terms and conditions of performance of the parties and includes, but is not limited to, those contracts commonly referred to as credit sales, deferred payment, delayed, production, bailment or price later contracts.

(4) "Deliver" or "delivery" means the physical transfer of agricultural commodity from one (1) party to another.

(5) "Department" means the Idaho state department of agriculture.

(6) "Depositor" means any person who deposits an agricultural commodity in an Idaho state licensed warehouse for storage, handling, processing, reconditioning or shipment, or who is the owner or legal holder of a negotiable warehouse receipt, outstanding scale weight ticket, nonnegotiable warehouse receipt or other evidence of such deposit, or any person whose agricultural commodity has been sold to or is under control of a warehouseman for selling, processing, reconditioning or handling whether or not such agricultural commodity is within the warehouse.

(7) "Director" means the director of the Idaho state department of agriculture.

(8) "Failure" means the date that one (1) or more of the following events occurred, as determined by the director:

(a) An inability to financially satisfy claimants in accordance with this chapter and the time limits provided for in it;

(b) A public declaration of insolvency;

(c) A revocation of license and the leaving of an outstanding indebtedness to a depositor or producer;

(d) A failure to redeliver any commodity to a depositor or to pay depositors or producers for commodities purchased by a licensee or to pay a producer for commodity delivered under the provisions of the contract in the ordinary course of business;

(e) A failure to make application for license renewal within sixty (60) days after the annual license renewal date; or

(f) A denial of the application for a license renewal.

(9) "Historical depositor" means any person who, in the normal course of business operation has consistently made deposits in the same warehouse of

commodities produced on the same land. In addition, anyone purchasing or leasing that particular land directly from the original depositor or receiving that particular land by devise, descent, bequest or gift directly from the historical depositor shall also be considered an historical depositor with regard to the commodities produced on that land.

(10) "Person" means any individual, firm, association, corporation, partnership or limited liability company.

(11) "Producer" means the owner, tenant or operator of land in this state who has an interest in the proceeds from the sale of agricultural commodities produced on that land. Producer does not include growers who deposit their commodity in a facility in which they have a financial or management interest, except members of a cooperative marketing association qualified under chapter 26, title 22, Idaho Code.

(12) "Public warehouse" or "warehouse" or "warehouseman" means any elevator, mill, warehouse, subterminal commodity warehouse, public warehouse or other structure or facility in which agricultural commodities are received for storage, shipment, processing, reconditioning or handling.

(13) "Receipt" means a warehouse receipt.

(14) "Revocation" means the permanent removal of a warehouse license following a hearing on violations of this chapter by the hearing officer or director.

(15) "Scale weight ticket" means a load slip or other evidence, other than a receipt, given to a depositor by a warehouseman licensed under the provisions of this chapter, upon initial delivery of the commodity to the warehouse.

(16) "Seed crops" means any seed crop regulated by chapter 4, title 22, Idaho Code.

(17) "Subterminal warehouse" means any warehouse at which an intermediate function is performed in which agricultural commodities are customarily received from dealers rather than producers and where the commodities are accumulated prior to shipment.

(18) "Suspension" means the temporary removal of a warehouse license by the department pending a hearing for violations of this chapter. Correction of the violations prior to a hearing may result in the reinstatement of a license without a hearing.

(19) "Termination" means the expiration of a warehouse license due to failure to meet minimum licensing requirements, failure to renew a warehouse license or as requested by the licensee, unless a complaint has been filed against the licensee alleging a violation of any provision of this chapter.

(20) "Transfer" means, unless otherwise defined by the parties in writing, the event when a producer or his agent delivers a commodity to a warehouseman, who then weighs the commodity, and gives the producer or his agent a scale weight ticket or other written evidence of transfer.

(21) "Warehouse receipt" means every receipt, whether negotiable or nonnegotiable, issued by a warehouseman, except scale weight tickets.

(22) "Warehouseman" means a person operating or controlling a public warehouse. [1919, ch. 152, § 2, p. 484; C.S., § 6179; am. 1931, ch. 7, § 1, p. 12; I.C.A., § 67-202; am. 1933, ch. 167, § 1, p. 298; am. 1951, ch. 86, § 1, p.

155; am. 1953, ch. 140, § 1, p. 230; am. 1957, ch. 98, § 1, p. 171; am. 1982, ch. 25, § 2, p. 32; am. 1983, ch. 44, § 1, p. 103; am. 1985, ch. 138, § 1, p. 375; am. 1988, ch. 350, § 1, p. 1033; am. 1990, ch. 183, § 1, p. 399; am. 1996, ch. 33, § 1, p. 84; am. 1999, ch. 203, § 1, p. 547; am. 2001, ch. 304, § 1, p. 1102; am. 2002, ch. 259, § 1, p. 756.]

### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

### JUDICIAL DECISIONS

#### ANALYSIS

Bailment.  
Licensee.  
Person.  
Warehouseman.

#### **Bailment.**

A deposit of a commodity for storage, handling, processing, reconditioning or shipment constitutes a bailment. *In re Hawkins Co.*, 104 Bankr. 317 (Bankr. D. Idaho 1989).

#### **Licensee.**

Licensee, who received agricultural produce, operated a public warehouse, not a field warehouse, since only a public warehouse can be licensed to receive agricultural produce. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom.*, *William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

#### **Person.**

The person, which procures the license to operate a bonded warehouse, is the person

liable for all losses of agricultural products in the warehouse. *Clark v. Daniel Morine Constr. Co.*, 98 Idaho 114, 559 P.2d 293 (1977).

#### **Warehouseman.**

A person "controlling a public warehouse" is the person having the ultimate power and authority to direct, govern, supervise and regulate the manner and method in which the warehouse shall be operated and it is certain that the legislature intended to place the responsibilities of the warehouseman on the person who obtained the license to operate the warehouse. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom.*, *William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**69-203. License necessary to operate public warehouse.** — Before a person can lawfully operate a public warehouse in this state, he must procure a license under this chapter; provided however, that the foregoing requirement as to licenses is not applicable to any warehouse or warehouseman who is licensed under an act of congress approved August 11, 1916 (39 Statutes at Large 44 [486]) and acts amendatory thereof, commonly called the "United States Warehouse Act," and who is licensed under chapter 5, title 69, Idaho Code. [1919, ch. 152, § 3, p. 484; C.S., § 6180; I.C.A., § 67-203; am. 1933, ch. 167, § 2, p. 298; am. 1947, ch. 70, § 1, p. 112; am. 1949, ch. 268, § 1, p. 538; am. 1983, ch. 44, § 2, p. 103.]

### STATUTORY NOTES

**Federal References.** — The United States Warehouse Act, referred to in this section, is compiled as 7 U. S. C., § 241 et seq.

**Compiler's Notes.** — The bracketed figure "486" was inserted by the compiler. The beginning page of the act is page 446 but the law



referred to actually begins on page 486.

The material enclosed in parentheses so appeared in the law as enacted.

### JUDICIAL DECISIONS

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951); Smith v. Great Basin Grain Co., 98 Idaho 266, 561 P.2d 1299 (1977).

### RESEARCH REFERENCES

**Am. Jur.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositories, § 4.

**69-204. Penalty for operating without a license — Misrepresentation.** — (1) Any person operating a public warehouse without a license or in any way representing, by actions or words, that the warehouse is so licensed when such warehouse is not so licensed or any person who shall misrepresent, forge, alter, counterfeit or falsely represent a license as required by the provisions of this chapter shall be guilty of a felony and punished by imprisonment in the state prison for not more than ten (10) years, or by a fine of not more than ten thousand dollars (\$10,000), or by both.

(2) Any person who shall issue, utter, or aid in the issuance or utterance or attempt to issue or utter a false or fraudulent receipt for any commodity shall be guilty of a felony and punished by imprisonment in the state prison for not more than ten (10) years, or by a fine of not more than ten thousand dollars (\$10,000), or by both. [I.C., § 69-204, as added by 1982, ch. 25, § 3, p. 32; am. 1983, ch. 44, § 3, p. 103; am. 2002, ch. 259, § 2, p. 756.]

### STATUTORY NOTES

**Prior Laws.** — Former § 69-204, which comprised (1919, ch. 152, § 4, p. 484; C.S., § 6181; I.C.A., § 67-204; am. 1974, ch. 18,

§ 232, p. 364) was repealed by S.L. 1982, ch. 25, § 1.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### **Application as Compliance.**

Application for license was sufficient compliance to protect the applicant from the penalties of this section for operating between the date of application and the time the license issued and was also sufficient to impose on it the liabilities provided by this chapter to

persons dealing with it during such period. William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951), aff'd sub nom., William H. Banks Whses., Inc. v. Watt, 196 F.2d 1018 (9th Cir. 1952), cert. denied, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**69-205. Inspection and classification of warehouses, storage, warehousing, weighing and certification of commodities — Duties of warehousemen.** — Upon application by any person for license to conduct a warehouse under this chapter, the department is authorized to investigate and determine whether the public warehouse for which licenses

are applied, or have been previously issued, under this chapter, is suitable for the proper storage of agricultural commodities and the department is authorized with or without application, to wit:

To inspect any warehouse licensed under this chapter; to inspect every licensed warehouse at least once every calendar year; to investigate the storage, warehousing, classifying according to grade, and otherwise weighing and certification of agricultural commodities therein conducted; to classify warehouses, licensed or applying for license, in accordance with their capacity and to prescribe, within the limitations of this chapter, the duties of the warehousemen conducting warehouses licensed under this chapter with respect to their care of and responsibility for agricultural commodities. [1919, ch. 152, § 5, p. 484; C.S., § 6182; I.C.A., § 67-205; am. 1982, ch. 25, § 4, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 1989, ch. 300, § 1, p. 747; am. 2002, ch. 259, § 3, p. 756.]

### JUDICIAL DECISIONS

#### **Liability for Conversion.**

In suit by farmers to recover for conversion of produce delivered to warehouse operated by defendant in name of another, and who advertised and posted statements that it was operating as such, it was estopped to deny

liability for conversion of produce. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom., William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), cert. denied, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**69-206. Licenses to warehousemen — Issue — Renewal — Conditions precedent.** — The department is authorized, upon application to it, to issue or renew to any warehouseman a license for the conduct of a warehouse or warehouses in accordance with this chapter and such rules as may be made hereunder, providing the following conditions are met:

(1) Each person, as a condition precedent to operating a warehouse in this state, shall file and maintain satisfactory evidence with the director of the existence of an effective policy of insurance issued by an insurance company authorized to do business in this state, insuring all agricultural commodities that may be stored or accepted for storage on the premises, including commodities owned by the warehouseman, for which such license is sought for the full market value of such agricultural commodities against loss by fire, internal explosion, lightning or tornado;

(2) That each warehouse be found suitable for the proper storage of the particular agricultural commodity or commodities for which a license is requested;

(3) A license fee is submitted to the department as prescribed by section 69-211, Idaho Code;

(4) A current drawing of the warehouse which shows storage facilities and the capacity calculations of the warehouse which indicates commodity and seed crop storage areas, shall be approved by the department;

(5) A sufficient and valid bond is filed and maintained as required by section 69-208, Idaho Code;

(6) The applicant shall submit to the department an audited or reviewed financial statement prepared by an independent certified public accountant or licensed public accountant showing that the licensee has and does

maintain current assets equal to or greater than current liabilities, a statement of current assets and current liabilities, and a statement of net worth, all of which shall be prepared in accordance with generally accepted accounting principles;

(7) For a warehouseman license an applicant shall have and maintain a net worth of at least fifty thousand dollars (\$50,000) or maintain a bond in the amount of two thousand dollars (\$2,000) for each one thousand dollars (\$1,000) or fraction thereof of net worth financial requirement; however, a person shall not be licensed as a warehouseman if the person has a net worth of less than twenty-five thousand dollars (\$25,000). A bond submitted for purposes of this subsection shall be in addition to any bond otherwise required under the provisions of this chapter;

(8) The applicant has complied with and abided by all the terms of this chapter and the rules prescribed hereunder;

(9) That all materials required for renewal of a license shall be received by the department prior to the expiration date of the warehouse license. A warehouse license which has expired may be reinstated by the department upon receipt of all necessary licensing materials required by the provisions of this chapter and a reinstatement fee in the amount of five hundred dollars (\$500), providing that this material is filed within thirty (30) days from the date of expiration of the warehouse license. At the end of the thirty (30) day reinstatement period, a warehouse license shall be terminated by the department. All license applications completed and received after the thirty (30) day reinstatement period shall be considered original applications and after the five hundred dollar (\$500) reinstatement fee has been remitted to the department, license fees shall be assessed as original fees according to section 69-211, Idaho Code. [1919, ch. 152, § 6, p. 484; C.S., § 6183; I.C.A., § 67-206; am. 1949, ch. 268, § 2, p. 538; am. 1951, ch. 86, § 2, p. 155; am. 1965, ch. 171, § 1, p. 338; am. 1974, ch. 18, § 233, p. 364; am. 1982, ch. 25, § 5, p. 32; am. 1983, ch. 44, § 4, p. 103; am. 1988, ch. 350, § 3, p. 1033; am. 1989, ch. 300, § 2, p. 747; am. 1990, ch. 183, § 2, p. 399; am. 2002, ch. 259, § 4, p. 756.]

## JUDICIAL DECISIONS

### ANALYSIS

Liability for loss.

Licensees.

Period license valid.

#### **Liability for Loss.**

The person who procures the license to operate a bonded warehouse is the person liable for all losses of agricultural products in the warehouse. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom.*, *William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

#### **Licensees.**

Licensee, who received agricultural produce, operated a public warehouse, not a field warehouse, since only a public warehouse can be licensed to receive agricultural produce. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom.*, *William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).



**Period License Valid.**

License was valid for period named in application, even though license was not issued until 9 months after start of period for the following reasons, (1) a timely application for license, (2) approval of bond, (3) right in licensee for exclusive possession of warehouse during period, (4) warehouse signs posted by

licensee, (5) no penalty exacted for failure to procure a license, and (6) licensee received produce at the warehouse. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom., William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**69-207. Term of license — Renewal.** — Each license issued under sections 69-206 and 69-215, Idaho Code, shall be issued for a period to be prescribed by rule by the department. [1919, ch. 152, § 7, p. 484; C.S., § 6184; I.C.A., § 67-207; am. 1933, ch. 167, § 3, p. 298; am. 1961, ch. 111, § 1, p. 169; am. 1965, ch. 171, § 2, p. 338; am. 2002, ch. 259, § 5, p. 756.]

**JUDICIAL DECISIONS****Period of Validity.**

Licensee was valid for period named in application, even though license was not issued until 9 months after start of period for the following reasons, (1) a timely application for license, (2) approval of bond, (3) right in licensee for exclusive possession of warehouse during period, (4) warehouse signs posted by

licensee, (5) no penalty exacted for failure to procure a license, and (6) licensee received produce at the warehouse. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom., William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**69-208. Bond of applicant for license — Additional bond — Additional obligations — Certificate of deposit or irrevocable letter of credit in lieu of bond — Single bond.** — Each warehouseman applying for a license to conduct a warehouse in accordance with this chapter shall, as a condition to the granting thereof, execute and file with the department a good and sufficient bond other than personal security. The bond shall be in favor of the commodity indemnity fund to secure the faithful performance of his obligations as a warehouseman under all the laws of the state, including obligations arising by operation of the commodity indemnity fund program, and the rules prescribed hereunder, and of such additional obligations as a warehouseman as may be assumed by him under contracts with the respective depositors of agricultural commodities in such warehouse. Said bond shall be in such form and amount, shall have such surety or sureties, and shall contain such terms and conditions as the department may prescribe to carry out the purposes of this chapter. Whenever the department shall determine that a bond approved by it is, or for any cause has become, insufficient, it shall require an additional bond or bonds to be given by the warehouseman concerned, conforming with the requirements of this section, and unless the same be given within the time fixed by a written demand therefor the license of such warehouseman shall be suspended or revoked.

The bond shall be approved by the department and shall be conditioned upon the faithful performance by the warehouseman of the duty to keep in the warehouse for the depositor the agricultural commodity delivered and to deliver the agricultural commodity to or for such depositors. The bond shall also be conditioned upon the faithful performance by the warehouseman of

any additional obligations involving marketing transactions with a depositor.

The warehouseman may give a single bond meeting the requirements as provided in this chapter and all warehouses operated by the warehouseman shall be as one (1) warehouse for the purpose of compliance with the provisions of this section. At the discretion of the director, any person required to submit a bond to the department in accordance with this chapter, may give to the department a certificate of deposit or an irrevocable letter of credit payable to the commodity indemnity fund in lieu of the bond required herein. The principal amount of the certificate of deposit or irrevocable letter of credit shall be the same as that required for a surety bond pursuant to this chapter. Accrued interest upon the certificate of deposit shall be payable to the purchaser of the certificate. The irrevocable letter of credit or certificate of deposit shall remain on file with the department until it is released, canceled or discharged by the director or until the director is notified ninety (90) days in advance, by registered or certified mail, return receipt requested, that the irrevocable letter of credit or certificate of deposit is renewed, canceled or amended. Failure to notify the director may result in the suspension or revocation of the bonded warehouse license. The provisions of this chapter that apply to a bond required pursuant to this chapter apply to each certificate of deposit or irrevocable letter of credit given in lieu of such bond.

Under provisions of this chapter, an irrevocable letter of credit or certificate of deposit shall not be acceptable unless it is issued by a national bank or federal thrift institution in Idaho or by a state-chartered bank or thrift institution authorized to conduct business in Idaho and insured by the federal deposit insurance corporation.

Any changes in the capacity of a warehouse or installation of any new warehouses involving a change in the bond liability under the provisions of this chapter shall be reported to the department prior to the operation thereof.

If a warehouseman is licensed pursuant to chapter 51, title 22, Idaho Code, that same warehouseman may obtain a single bond, certificate of deposit or irrevocable letter of credit as surety for both chapter 2, title 69, Idaho Code, and chapter 51, title 22, Idaho Code. If a single bond, certificate of deposit or irrevocable letter of credit is written covering chapter 2, title 69, Idaho Code, and chapter 51, title 22, Idaho Code, the bond, certificate of deposit or irrevocable letter of credit shall be made out in favor of the commodity indemnity fund and the seed indemnity fund. In the event a warehouseman fails as defined in section 69-202(8), Idaho Code, and a single bond, certificate of deposit or irrevocable letter of credit is written in favor of the commodity indemnity fund and seed indemnity fund, the proceeds of the bond, certificate of deposit or irrevocable letter of credit will be allocated based on the dollar amount of the verified claims approved pursuant to chapter 2, title 69, Idaho Code, and chapter 51, title 22, Idaho Code. [1919, ch. 152, § 8, p. 484; C.S., § 6185; am. 1921, ch. 34, § 1, p. 43; I.C.A., § 67-208; am. 1982, ch. 25, § 6, p. 32; am. 1983, ch. 44, § 5, p. 103; am. 1985, ch. 138, § 2, p. 375; am. 1987, ch. 143, § 1, p. 284; am. 1988, ch.



350, § 3, p. 1033; am. 1992, ch. 44, § 1, p. 145; am. 1996, ch. 34, § 1, p. 86; am. 2002, ch. 259, § 6, p. 756; am. 2003, ch. 150, § 1, p. 430.]

STATUTORY NOTES

**Effective Dates.** — Section 6 of S.L. 2003, ch. 150 declared an emergency. Approved March 27, 2003.

JUDICIAL DECISIONS

ANALYSIS

Liability of surety.  
Recovery on bond.

**Liability of Surety.**

Surety of warehouseman was not liable for amount of wheat purchased by warehouseman from the plaintiff, as liability of a surety was limited to the failure of the warehouseman to redeliver grain stored. *Jensen v. United States Fid. & Guar. Co.*, 78 Idaho 145, 298 P.2d 976 (1955).

**Recovery on Bond.**

In suit by plaintiff to recover on warehouseman's bond based on prior judgment secured against warehouseman, the surety was not entitled to judgment on the pleadings based

on contention that in prior suit the plaintiff had alleged a sale, and that it could not now contend that there was a conversion, and that plaintiff was estopped to assert a theory different than the theory asserted in the prior suit, since matter of prior adjudication and prejudice could not be determined until after the taking of the evidence. *Jensen v. United States Fid. & Guar. Co.*, 76 Idaho 351, 283 P.2d 185 (1955).

**Cited in:** *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951); *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

**69-208A. Amount of bond — Cancellation.** — The amount of bond to be furnished for each warehouse shall be fixed at whichever of the following amounts is greater:

- (1) The combined total indebtedness paid and owed to producers for agricultural commodity and seed crop stored for withdrawal or transferred during the previous license year; or
- (2) The indebtedness owed and estimated to be owed to producers for agricultural commodity and seed crop for the current license year.

Subsequent to determining whichever of the preceding amounts is greater, and based on that amount, the amount of bond shall be calculated as follows:

Gross Dollars:	Amount of Bond:
\$0 - \$450,000	\$20,000 bond or 6% of the gross dollars, whichever is less
\$450,001 - \$1,000,000	\$40,000 bond
\$1,000,001 - \$8,000,000	\$100,000 bond
Over \$8,000,000	\$500,000 bond

Any other bond that may be required shall be separate and in addition to the bond listed here. In any case, the amount of the bond shall not be more than five hundred thousand dollars (\$500,000). This bond shall run continuously with the warehouse license until suspended, revoked or canceled by the bonding company. A ninety (90) day written notice shall be given to the department by the bonding company before any bond is suspended, revoked



or canceled. The director reserves the right to waive the ninety (90) day cancellation period. [I.C., § 69-208A, as added by 1982, ch. 25, § 7, p. 32; am. 1985, ch. 138, § 3, p. 375; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 7, p. 756; am. 2003, ch. 150, § 2, p. 430.]

### STATUTORY NOTES

**Effective Dates.** — Section 6 of S.L. 2003, ch. 150 declared an emergency. Approved March 27, 2003.

**69-209. Action on bond, certificate of deposit or irrevocable letter of credit by producers injured.** — Any producer injured by the breach of any obligation for which a bond, certificate of deposit or irrevocable letter of credit is written, under the provisions of section 69-208, Idaho Code, must petition the director to make demand upon the warehouseman, certificate of deposit, irrevocable letter of credit or bond. The director may thereupon make demand for payment of such damages and in the event such damages are not promptly paid the director may commence an action to enforce payment of such damages. The liability of the bank on a certificate of deposit or irrevocable letter of credit, and the surety upon the bond required to be given by warehousemen as provided in section 69-208, Idaho Code, for any one (1) annual licensing period shall be limited to the amount specified in the bond, certificate of deposit, or irrevocable letter of credit and in case of recoveries had by two (2) or more producers for violation of the conditions of this chapter in excess of the amount of the bond, certificate of deposit, or irrevocable letter of credit, such recovery shall be prorated and the total recovery for any one (1) annual licensing period shall not exceed the amount of the bond, certificate of deposit, or irrevocable letter of credit. In the event the director sues and obtains a judgment against the warehouseman and/or his surety or bank for payment of such damages under this chapter, he shall be entitled to recover a reasonable attorney's fee. [1919, ch. 152, § 9, p. 484; C.S., § 6186; I.C.A., § 67-209; am. 1933, ch. 167, § 4, p. 298; am. 1953, ch. 61, § 1, p. 81; am. 1974, ch. 18, § 234, p. 364; am. 1974, ch. 82, § 1, p. 1172; am. 1982, ch. 25, § 8, p. 32; am. 1983, ch. 44, § 6, p. 103; am. 1985, ch. 138, § 4, p. 375; am. 2002, ch. 259, § 8, p. 756; am. 2003, ch. 150, § 3, p. 430.]

### STATUTORY NOTES

**Effective Dates.** — Section 6 of S.L. 2003, ch. 150 declared an emergency. Approved March 27, 2003.

### JUDICIAL DECISIONS

#### ANALYSIS

Attorney's fees.  
Limitation of actions.  
Suit for conversion.

**Attorney's Fees.**

Since the broad language of § 41-1839 provides for the award of attorney's fees in a suit against the surety for a bond warehouseman, the addition to this section of a provision for attorney's fees in 1974 does not give rise to the inference that before that date no attorney's fees were to be awarded in actions on warehousemen's bonds. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

There is no requirement that the amount of attorney's fees awarded bear a reasonable relationship to the amount of the judgment. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

The amount of attorney's fees to be awarded is that sum which the trial court in its discretion determines to be reasonable. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 561 P.2d 1299 (1977).

**Limitation of Actions.**

Where intervenor brought action against warehouseman for conversion of grain more

than three years after making demand on warehouseman for the grain three year statute of limitations of § 5-218 was not tolled by intervenor's petitioning the Commissioner of Agriculture under this section as Commissioner did not commence a suit in intervenor's behalf and intervenor's petition to Commissioner did not constitute commencing an action. *United States v. Fireman's Fund Ins. Co.*, 191 F. Supp. 317 (D. Idaho 1961).

**Suit for Conversion.**

In suit by farmers to recover for conversion of produce delivered to warehouse operated by defendant in name of another, and who advertised and posted statements that it was operating as such, defendant was estopped to deny liability for conversion of produce. *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951), *aff'd sub nom., William H. Banks Whses., Inc. v. Watt*, 196 F.2d 1018 (9th Cir. 1952), *cert. denied*, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**RESEARCH REFERENCES**

**A.L.R.** — Sufficiency of warehouseman's precautions to protect goods against fire. 42 A.L.R.3d 908.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property. 64 A.L.R.3d 1207.

Bailee's liability for bailor's expense of recovering stolen subject of bailment. 80 A.L.R.3d 264.

Bailee's liability as affected by bailment condition that bailor procure insurance. 83 A.L.R.3d 519.

**69-210. Designation of warehouse as bonded warehouse.** — Upon the filing with and approval by the department of a bond, in compliance with this chapter, for the conduct of a warehouse, such warehouse shall be designated as bonded hereunder; but no warehouse shall be designated as bonded under this chapter, and no name or description conveying the impression that it is so bonded, shall be used, until a bond, such as provided for in section 69-208, Idaho Code, has been filed with and approved by the department, nor unless the license issued under this chapter for the conduct of such warehouse remains unsuspended and unrevoked. [1919, ch. 152, § 10, p. 484; C.S., § 6187; am. 1921, ch. 34, § 2, p. 43; I.C.A., § 67-210; am. 1982, ch. 25, § 9, p. 32; am. 2002, ch. 259, § 9, p. 756.]

**STATUTORY NOTES**

**Cross References.** — Bond of applicant for license, § 69-208.

**Effective Dates.** — Section 3 of S.L. 1921,

ch. 34 declared an emergency. Approved February 24, 1921.

**JUDICIAL DECISIONS**

**Cited in:** *William H. Banks Whses., Inc. v. Jean*, 96 F. Supp. 731 (D. Idaho 1951).

**69-211. Fees of department.** — (1) The department shall charge, assess, and cause to be collected an annual fee for each warehouse license or renewal thereof, according to the following schedule:

For each original application —

Capacity in Hundredweight	Rate
0 to 50,000	\$180.00
50,001 to 100,000	360.00
100,001 to 250,000	540.00
250,001 to 500,000	715.00
500,001 to 750,000	890.00
Over 750,000	1,070.00

For each renewal application —

Capacity in Hundredweight	Rate
0 to 50,000	\$50.00
50,001 to 100,000	100.00
100,001 to 250,000	145.00
250,001 to 500,000	190.00
500,001 to 750,000	240.00
Over 750,000	290.00

(2) The department shall assess and collect a fee of one hundred dollars (\$100) for each inspection of a warehouse or station which is done for the purpose of amending a warehouse license.

(3) The department shall assess and collect a fee of two hundred fifty dollars (\$250) per day or fraction thereof for maintaining each employee of the department at a warehouse to oversee the correction of a violation of the provisions of this chapter or the rules promulgated hereunder.

(4) Upon approval by the department, a warehouseman may operate two (2) or more warehouses under a single warehouse license.

(5) All fees shall be deposited into the commodity indemnity fund. [1919, ch. 152, § 11, p. 484; C.S., § 6188; I.C.A., § 67-211; am. 1933, ch. 167, § 5, p. 298; am. 1949, ch. 268, § 3, p. 538; am. 1950 (E.S.), ch. 7, § 1, p. 17; am. 1957, ch. 98, § 2, p. 171; am. 1982, ch. 25, § 10, p. 32; am. 1983, ch. 44, § 7, p. 103; am. 1985, ch. 138, § 5, p. 375; am. 1987, ch. 143, § 2, p. 284; am. 1990, ch. 183, § 3, p. 399; am. 2002, ch. 259, § 10, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 3 of S.L. 1950 (E.S.), ch. 7 provided that it should be in full force and effect on and after July 1, 1950.

**69-212. Schedule of charges — Posting.** — Every licensed warehouseman shall annually, during the first week of July, publish by posting in a conspicuous place in his warehouse, a schedule of storage, handling, conditioning or any other charges or discounts for the ensuing year, which schedule shall be kept posted in a conspicuous place in said warehouse. Further, the warehouseman shall annually, during the first week in July, mail to the department, a copy of such charges. All charges made by any public warehouseman hereunder for the handling and storage of agricul-



tural commodities shall be just, fair and reasonable; and the director is hereby vested with the power and authority upon the complaint of any person interested or upon his own motion, after a full hearing, to declare any existing charge for the handling or storage of any agricultural commodity to be unreasonable or unjust and to determine and order what shall be a just and reasonable charge to be imposed or enforced in place of that found to be unreasonable or unjust. Failure to file and post scheduled charges for the current year will keep in full force and effect the latest previously posted and filed schedule of rates. [1919, ch. 152, § 12, p. 484; C.S., § 6189; I.C.A., § 67-212; am. 1933, ch. 167, § 6, p. 298; am. 1951, ch. 86, § 3, p. 155; am. 1974, ch. 18, § 235, p. 264; am. 1982, ch. 25, § 11, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 11, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 263 of S.L. 1974, ch. 18 provided that the act would be in full force and effect on and after July 1, 1974.

#### JUDICIAL DECISIONS

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

**69-213. Privilege of examining commodities stored.** — Every depositor having an interest in any agricultural commodity stored in any such warehouse, and every state inspector authorized by the director, shall have the right to examine at any reasonable time during ordinary business hours any commodity so stored, and all parts of such warehouses, provided the warehouse or the agricultural commodities stored therein is not endangered by such inspection; and every warehouseman, his agents and employees shall furnish safe and reasonable access and facilities for such examination. [1919, ch. 152, § 13, p. 484; C.S., § 6190; I.C.A., § 67-213; am. 1982, ch. 25, § 12, p. 32; am. 1983, ch. 44, § 8, p. 103; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 12, p. 756.]

#### JUDICIAL DECISIONS

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

**69-213A. Annual notification.** — Beginning in the year 2005, on or before December 1 of each year, every licensed warehouseman shall send written notification to each individual having an interest in any agricultural commodity stored in their warehouse for a period of thirty-six (36) months or more, or having an interest in any open credit sales contract related to an agricultural commodity with the warehouseman, for the purpose of confirming said interest, which notification shall include the name of the individual, and the type and measurement of the agricultural commodity. Notification shall be sent by United States mail, postage prepaid to the last known address of each individual. Warehousemen shall maintain a record of the

names and addresses of the individuals to whom notification was sent. A warehouseman may voluntarily elect to provide annual notification to any individual having an interest in any agricultural commodity stored in their warehouse for a period of less than thirty-six (36) months. Notwithstanding any other provision of this section, a warehouseman shall not be required to send annual notification to any individual having an interest in any agricultural commodity stored in their warehouse that was produced on lands owned by an Indian tribe as defined in section 67-4001, Idaho Code. [I.C., § 69-213A, as added by 2004, ch. 146, § 1, p. 476.]

**69-214. Employment of personnel.** — The department may employ such inspectors, investigators, samplers and weighers as it may deem necessary. [1919, ch. 152, § 14, p. 484; C.S., § 6191; I.C.A., § 67-214; am. 2002, ch. 259, § 13, p. 756.]

#### JUDICIAL DECISIONS

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

**69-215. Licenses to weigh commodities for storage.** — Every warehouse licensed under this chapter shall have a weighmaster licensed pursuant to the provisions of the Weighmaster's Licensing Act; provided, however, that if agricultural commodities are not received or delivered by a warehouse over scales, a weighmaster's license shall not be required. [1919, ch. 152, § 15, p. 484; C.S., § 6192; I.C.A., § 67-215; 1949, ch. 268, § 4, p. 538; am. 1951, ch. 86, § 4, p. 155; am. 1988, ch. 350, § 3, p. 1033.]

#### STATUTORY NOTES

**Compiler's Notes.** — The Weighmaster's Licensing Act, referred to in this section, is compiled as §§ 71-401 — 71-411.

**Effective Dates.** — Section 5 of S.L. 1951, ch. 86 declared an emergency. Approved March 6, 1951.

**69-216. Suspension or revocation of license to classify, grade or weigh products for storage. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised (1919, ch. 152, § 16, p. 484; C.S., § 6193; I.C.A., § 67-216) was repealed by S.L. 1982, ch. 25, § 1.

**69-217. Right to assess and collect fees.** — The department shall have the right to assess and collect such fees as may be necessary to carry out the provisions of this chapter. [I.C., § 69-217, as added by 1982, ch. 25, § 13, p. 32.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 69-217, which comprised (1919, ch. 152, § 17, p. 484; C.S., § 6194; I.C.A., § 67-217) was repealed by S.L. 1982, ch. 25, § 1.

**69-218. Warehousemen to receive commodities according to capacity.** — Every warehouseman conducting a warehouse licensed under this chapter shall receive for storage therein, so far as its capacity permits, any agricultural commodity of the kind customarily stored therein by him which may be tendered to him by historical depositors, bearing certificate, when required, of an official inspector showing suitable condition, for warehousing, in the usual manner in the ordinary and usual course of business. A warehouseman may accept agricultural commodities from new depositors who qualify to the extent of the capacity of the warehouse. [1919, ch. 152, § 18, p. 484; C.S., § 6195; I.C.A., § 67-218; am. 1982, ch. 25, § 14, p. 32; am. 1988, ch. 350, § 3, p. 1033.]

#### JUDICIAL DECISIONS

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

**69-219. Commodities deemed delivered subject to law.** — Any person who delivers agricultural commodities to a warehouse licensed under this chapter, for storage or under terms of a contract, shall be deemed to have delivered the same subject to the terms of this chapter and the rules prescribed hereunder. [1919, ch. 152, § 19, p. 484; C.S., § 6196; I.C.A., § 67-219; am. 1988, ch. 350, § 3, p. 1033; am. 2001, ch. 304, § 2, p. 1102; am. 2002, ch. 259, § 14, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

#### JUDICIAL DECISIONS

##### **Suit for Conversion.**

Where defendant operated a warehouse in the name of another and advertised and posted statements using such other name, the defendant was estopped to deny liability for conversion of produce stored. William H.

Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951), aff'd sub nom., William H. Banks Whses., Inc. v. Watt, 196 F.2d 1018 (9th Cir. 1952), cert. denied, 346 U.S. 825, 74 S. Ct. 43, 98 L. Ed. 350 (1953).

**69-220. Inspection and grading of diseased or insect infested commodities.** — Any diseased or insect infested agricultural commodity complained of by the department or any person having interest in the warehouse or agricultural commodities stored in a warehouse licensed under this chapter shall be inspected and graded by a representative of the department or a person duly licensed to grade the same under this chapter, and if such inspection or grading shows such agricultural commodity to be in a condition that its continued storing or retention would injure or damage the warehouse or other commodities stored therein the owner shall, by order of the director, forthwith remove and dispose of such agricultural commodity as directed. If the owner of such commodity is unknown to the inspector or warehouseman, the warehouseman shall proceed to remove or make dispo-



sition of such commodity in a manner that will tend to save and realize the values contained in such commodity by the owner, under such rules and regulations as may be promulgated under this chapter or the uniform commercial code. [1919, ch. 152, § 20, p. 484; C.S., § 6197; I.C.A., § 67-220; am. 1982, ch. 25, § 15, p. 32; am. 1983, ch. 44, § 9, p. 103; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 15, p. 756.]

**69-221. Fungible products of different grades to be kept separate.  
[Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which § 6198; I.C.A., § 67-221) was repealed by comprised (1919, ch. 152, § 21, p. 484; C.S., S.L. 1982, ch. 25, § 1.

**69-222. Receipts — Scale weight tickets.** — For all agricultural commodities delivered to a warehouse licensed under this chapter original negotiable or nonnegotiable warehouse receipts, or scale weight tickets, shall be issued by the warehouseman conducting the same, but no receipts, or scale weight tickets, shall be issued except for agricultural commodities delivered to the warehouse at the time of the issuance thereof; provided, however, that no negotiable receipt need be issued except when requested by the depositor. [1919, ch. 152, § 22, p. 484; C.S., § 6199; I.C.A., § 67-222; am. 1949, ch. 268, § 5, p. 538; am. 1957, ch. 98, § 3, p. 171; am. 1982, ch. 25, § 16, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 2001, ch. 304, § 3, p. 1102; am. 2002, ch. 259, § 16, p. 756.]

**STATUTORY NOTES**

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

**JUDICIAL DECISIONS**

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

**69-223. Negotiable warehouse receipts for commodities stored — Contents — Conditions — Penalties.** — Every negotiable warehouse receipt issued for agricultural commodities stored in a warehouse licensed under the provisions of this chapter shall be issued in accordance with, but not limited to, the following:

(1) Every negotiable warehouse receipt issued for agricultural commodities stored in a warehouse licensed under the provisions of this chapter shall embody within its written or printed terms:

(a) All the requirements of a negotiable warehouse receipt under the Uniform Commercial Code—Documents of Title.

(b) A description of the agricultural commodities received, showing the quantity thereof, or, in case of agricultural commodities customarily put up in bales or packages, a description of such bales or packages by marks,

numbers, or other means of identification and the weight of such bales or packages.

(c) The grade or other class of the agricultural commodities received and the standard or description in accordance with which such classification has been made: provided, that such grade or other class shall be stated according to the official standards of the state applicable to such agricultural commodities as the same may be fixed and promulgated under authority of law; provided further that until such official standards of the state for any agricultural commodity or commodities have been fixed and promulgated, the grade or other class thereof may be stated in accordance with any recognized standard; provided, that unless otherwise required by law, when requested by the depositor of other than fungible agricultural commodities, a receipt omitting compliance with this subdivision may be issued if it has plainly and conspicuously embodied in its written or printed terms a provision that such negotiable warehouse receipt is not graded.

(d) A statement that the negotiable warehouse receipt is issued subject to the provisions of this chapter and the rules prescribed hereunder.

(e) Such other terms and conditions within the limitations of this chapter as may be required by the department.

(f) All negotiable warehouse receipts issued under the provisions of this chapter, shall be upon forms prepared and supplied by the department and issued upon requisition of the warehouseman at a reasonable cost.

(2) Any warehouseman, agent, employee or manager of a public warehouse licensed under the provisions of this chapter who shall remove or allow to be removed any commodities from the facility on which the negotiable warehouse receipt was issued, except to preserve the same from fire or other damage, or except when an emergency storage situation exists as determined by the director, without the return and cancellation of any and all outstanding negotiable warehouse receipts that may have been issued to represent such commodities shall be guilty of a felony and be punished by imprisonment in the state prison not to exceed ten (10) years, or by a fine of not more than ten thousand dollars (\$10,000), or by both. [1919, ch. 152, § 23, p. 484; C.S., § 6200; I.C.A., § 67-223; am. 1933, ch. 167, § 7, p. 298; am. 1947, ch. 70, § 2, p. 112; am. 1967, ch. 272, § 29, p. 745; am. 1982, ch. 25, § 17, p. 32; am. 1983, ch. 44, § 10, p. 103; am. 1984, ch. 19, § 1, p. 21; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 17, p. 756.]

#### STATUTORY NOTES

**Compiler's Notes.** — The word enclosed in parentheses so appeared in the law as enacted.

For sections in which "this chapter" is compiled, see Compiler's notes, § 69-201.

## JUDICIAL DECISIONS

## DECISIONS UNDER PRIOR LAW

**Issuance of Receipts.**

When a warehouseman receives grain for storage, he shall issue a warehouse receipt in

a specified form. *State v. Henzell*, 17 Idaho 725, 107 P. 67, 27 L.R.A. (n.s.) 159 (1910).

## RESEARCH REFERENCES

**A.L.R.** — Construction and effect of UCC Art. 7, dealing with warehouse receipts, bills

of lading, and other documents of title. 21 A.L.R.3d 1339.

**69-224. Standards for agricultural commodities.** — The department is authorized, from time to time, to establish and promulgate standards for agricultural commodities by which their quality or value may be judged or determined.

So far as practicable such standards shall conform to the official standards of the United States or the state of Idaho applicable to such agricultural commodities as the same may from time to time be fixed and promulgated.

No warehouseman in this state shall insert in any receipt issued by him any language in any way limiting or modifying his liabilities, or responsibilities, as imposed by the laws of this state. [1919, ch. 152, § 24, p. 484; C.S., § 6201; I.C.A., § 67-224; am. 1982, ch. 25, § 18, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 18, p. 756.]

**69-225. Loss of receipts — Conditions of reissue.** — While an original receipt issued under this chapter is outstanding and uncanceled by the warehouseman issuing the same no other or further receipt shall be issued for the agricultural commodity covered thereby or for any part thereof. In order to issue a new warehouse receipt supplementing one that has been lost or destroyed or to cancel an outstanding warehouse receipt that has been lost or destroyed, the licensed warehouseman shall require the depositor or other applicant to submit to the warehouseman: (1) an affidavit stating that he is lawfully entitled to possession of the original receipt, that he has not negotiated or assigned it and how the original receipt was lost or destroyed, and (2) a bond in an amount double the market value of the agricultural commodity represented by the lost or destroyed receipt. The market value shall be determined at the time this bond is submitted for the lost receipt. A warehouse receipt issued in lieu of a lost or destroyed receipt shall duplicate the original and bear a statement that it is issued in lieu of the lost or destroyed receipt. A duplicate receipt must clearly state on its face that it is a duplicate receipt, the number of the receipt it is replacing and the license number under which the original receipt was issued. [1919, ch. 152, § 25, p. 484; C.S., § 6202; I.C.A., § 67-225; am. 1983, ch. 44, § 11, p. 103; am. 1988, ch. 350, § 3, p. 1033.]

**69-226. Records of warehouses — Conduct of warehouses.** — Every warehouseman conducting a warehouse licensed under the provisions of this chapter shall keep in a place of safety complete and correct records



and shall conduct said warehouse in all other respects in compliance with this chapter and the rules promulgated hereunder. [1919, ch. 152, § 26, p. 484; C.S., § 6203; I.C.A., § 67-226; am. 1982, ch. 25, § 19, p. 32; am. 2002, ch. 259, § 19, p. 756.]

### JUDICIAL DECISIONS

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

### DECISIONS UNDER PRIOR LAW

#### Issuance of Receipts.

When a warehouseman receives grain for storage, he must issue a warehouse receipt in

a specified form. State v. Henzell, 17 Idaho 725, 107 P. 67 (1910).

**69-227. Examination of commodities or seed crops — Records — Publication of findings.** — The department is authorized to cause examination to be made of any agricultural commodity or seed crop deposited, or any record pertaining to commodities or seed crops deposited therein, in any warehouse licensed under the provisions of this chapter. Whenever, after opportunity for hearing is given to the warehouseman conducting such warehouse, it is determined that he is not performing fully the duties imposed on him by this chapter and the rules promulgated hereunder, the department may publish its findings in a local daily or weekly newspaper in the area where the warehouse is located. [1919, ch. 152, § 27, p. 484; C.S., § 6204; I.C.A., § 67-227; am. 1949, ch. 268, § 6, p. 538; am. 1982, ch. 25, § 20, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 2001, ch. 304, § 4, p. 1102; am. 2002, ch. 259, § 20, p. 756.]

### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

### JUDICIAL DECISIONS

#### Construction.

Growers' two claims against Department of Agriculture for failure to disclose shortfall of inspected bean warehouse and for negligent failure to revoke the warehouse's license were properly rejected by the district court under the discretionary function exemption to gov-

ernmental liability of subsection (1) of § 6-904 and due to the permissive language of this section and § 69-228. Crown v. State, 127 Idaho 175, 898 P.2d 1086 (1995).

**Cited in:** William H. Banks Whses., Inc. v. Jean, 96 F. Supp. 731 (D. Idaho 1951).

**69-228. Suspension or revocation of license.** — The department may, after opportunity for hearing has been afforded to the licensee concerned, suspend or revoke any license issued to any person under the provisions of this chapter, for any violation of or failure to comply with any provision of this chapter, chapter 7 of the uniform commercial code or the rules promulgated hereunder or upon the ground that the licensee has used his license or allowed it to be used for any improper purpose. Pending

investigation the department, whenever it deems necessary, may suspend a license temporarily without hearing. [1919, ch. 152, § 28, p. 484; C.S., § 6205; I.C.A., § 67-228; am. 1982, ch. 25, § 21, p. 32; am. 2002, ch. 259, § 21, p. 756.]

### JUDICIAL DECISIONS

#### **Construction.**

Growers' two claims against Department of Agriculture for failure to disclose shortfall of inspected bean warehouse and for negligent failure to revoke the warehouse's license were properly rejected by the district court under

the discretionary function exemption to governmental liability of subsection (1) of § 6-904 and due to the permissive language of § 69-227 and this section. *Crown v. State*, 127 Idaho 175, 898 P.2d 1086 (1995).

**69-229. Publication of reports.** — The department from time to time may publish the results of any investigations made under the provisions of this chapter; and it may publish the names and addresses of persons licensed under this chapter and a list of all licenses terminated under this chapter and the causes therefore. [1919, ch. 152, § 29, p. 484; C.S., § 6206; I.C.A., § 67-229; am. 1982, ch. 25, § 22, p. 32; am. 2002, ch. 259, § 22, p. 756.]

**69-230. Examination of books — Authorization to copy.** — The department is authorized through officials, employees, or agents of the department designated by it, to examine and make copies of all books, records, papers, and accounts of warehouses relating thereto, including those described in section 69-227, Idaho Code. [1919, ch. 152, § 30, p. 484; C.S., § 6207; I.C.A., § 67-230; am. 2002, ch. 259, § 23, p. 756; am. 2003, ch. 150, § 4, p. 430.]

### STATUTORY NOTES

**Effective Dates.** — Section 6 of S.L. 2003, ch. 150 declared an emergency. Approved March 27, 2003.

**69-231. Rules.** — The department shall from time to time promulgate such rules as it may deem necessary for the efficient execution of the provisions of this chapter. [1919, ch. 152, § 31, p. 484; C.S., § 6208; I.C.A., § 67-231; am. 2002, ch. 259, § 24, p. 756.]

**69-232. Cooperation with governmental agencies and private associations.** — The director may cooperate with and enter into agreements with governmental agencies of this state, other states, agencies of the federal government, and private associations in order to carry out the purpose and provisions of this chapter and the United States warehouse act (7 U.S.C.A. section 241, et seq.). Notwithstanding any other provisions of this chapter, such agreements may also relate to a joint program for licensing, bonding and inspecting stations. Such a program should be designed to avoid duplication of effort on the part of the licensing authority and requirements for operation, and promote more efficient enforcement of

the provisions of this chapter and comparable provisions of the laws of the states of Oregon, Washington, Montana, Wyoming, Utah and Nevada and the province of British Columbia, Canada. [1919, ch. 152, § 32, p. 484; C.S., § 6209; I.C.A., § 67-232; am. 1982, ch. 25, § 23, p. 32; am. 1990, ch. 183, § 4, p. 399.]

**69-233. Violation of law — Penalty.** — Any person who violates any provision of this chapter or the rules promulgated hereunder, or who shall impede, obstruct, hinder or otherwise prevent or attempt to prevent the director or his duly authorized representative in the performance of his duty in connection with the provisions of this chapter, except as provided in sections 69-204, 69-212, 69-223 and 69-248, Idaho Code, shall be guilty of a misdemeanor and be punished by imprisonment in a county jail not to exceed six (6) months, or by a fine of not more than one thousand dollars (\$1,000), or by both. [I.C., § 69-233, as added by 1982, ch. 25, § 24, p. 32; am. 2002, ch. 259, § 25, p. 756.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 69-233, which § 8, p. 298) was repealed by S.L. 1982, ch. 25, comprised (1919, ch. 152, § 33, p. 484; C.S., § 1. § 6210; I.C.A., § 67-233; am. 1933, ch. 167,

**69-234. Rent of quarters — Employment of assistants.** — The department is authorized to rent quarters and to employ persons as it may deem necessary, and it is authorized, in its discretion, to employ qualified persons not regularly in the service of the state for temporary assistance in carrying out the purposes of this chapter. [1919, ch. 152, § 34, p. 484; C.S., § 6211; I.C.A. § 67-234; am. 1982, ch. 25, § 25, p. 32.]

**69-235. Effect of partial invalidity of law.** — If any clause, sentence, paragraph, or part of this chapter shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered. [1919, ch. 152, § 35, p. 484; C.S., § 6212; I.C.A., § 67-235.]

**69-236. Noncompliance — Failure — Remedies of department.** — (1) Whenever it appears, after any investigation, that a warehouseman does not have in his possession sufficient agricultural commodities to cover the outstanding warehouse receipts, scale weight tickets, or other evidence of storage liability issued or assumed by him, or the ability to pay producers for contract obligations, or when the warehouseman refuses to submit his books, papers, or property to lawful inspection, the department shall give notice to the warehouseman to comply with all or any of the following requirements:

- (a) Cover such shortage;
- (b) Give an additional bond as requested by the department; or



(c) Submit to such inspection as the department may deem necessary.

(2) If the warehouseman fails to comply with the terms of such notice within twenty-four (24) hours from the date of issuance of the notice, or within such further time as the department may allow, not to exceed ten (10) working days, the department shall petition the district court in the county where the licensee's principal place of business is located (as shown by the license application) for an order:

(a) Authorizing the department to seize and take possession of any or all agricultural commodities in the warehouse or warehouses owned, operated, or controlled by the warehouseman, and of all books, papers and property of all kinds used in connection with the conduct or the operation of the warehouse business, and any materials which pertain in any way to that business; and

(b) Enjoining the warehouseman from interfering with the department in the discharge of its duties as required by the provisions of this section.

(3) Upon taking possession, the department shall give written notice of its action to the surety on the bond of the warehouseman and shall notify the holders or producers of record, as shown by the warehouseman's records, of all negotiable or nonnegotiable warehouse receipts, scale weight tickets, or contracts issued for agricultural commodities, to present their warehouse receipt or other evidence of deposits or obligation for inspection or to account for the same. The department shall thereupon cause an audit to be made of the affairs of such warehouse including, but not limited to, the agricultural commodities in which there is an apparent shortage, to determine the amount of such shortage and compute the shortage as to each depositor as shown by the warehouseman's records, if possible. The department shall notify the warehouseman and the surety on his bond of the approximate amount of such shortage and notify each depositor thereby affected by sending notices to the depositor's last known address as shown by the records of the warehouseman.

(4) The department shall retain possession of the agricultural commodities in the warehouse or warehouses, and the books, papers, and property of the warehouseman, until such time as the warehouseman or the surety on the bond shall have satisfied the claims of all holders of warehouse receipts or other evidence of deposits or obligations, in case the obligations exceed the amount of the bond, the surety on the bond shall have satisfied such claims pro rata, or until such time as the department is ordered by the court to surrender possession.

(5) If during or after the audit provided for in this section, or at any other time the department has evidence that the warehouseman is insolvent or is unable to satisfy the claims of all holders of warehouse receipts or other evidence of obligations, the department shall petition the district court for the appointment of a receiver to operate or liquidate the business of the warehouseman in accordance with the law.

(6) At any time within ten (10) days after the department takes possession of any agricultural commodities, or the books, papers, or property of any warehouse, the warehouseman may serve notice on the department to appear in the district court of the county in which the warehouse is located,

at a time to be fixed by the court, and show cause why the agricultural commodities, books, papers and other property should not be restored to his possession.

(7) All court costs, attorney's fees, other professional fees and necessary expenses incurred by the department in carrying out the provisions of this section may be recovered in any civil action brought by the department in district court or recovered at the same time and as part of the receivership or seizure action filed under the provisions of this chapter.

(8) As a part of the expenses so incurred, the department or the receiver is authorized to include the cost of adequate liability insurance necessary to protect the department, its officers, and others engaged in carrying out the provisions of this section.

(9) The provisions and remedies of this section are not limited to a warehouse shortage. [I.C., § 69-236, as added by 1982, ch. 25, § 26, p. 32; am. 1983, ch. 44, § 12, p. 103; am. 1985, ch. 138, § 6, p. 375; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 26, p. 756.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

#### JUDICIAL DECISIONS

**Cited in:** *Crown v. State*, Dep't of Agric., 127 Idaho 188, 898 P.2d 1099 (Ct. App. 1994).

**69-237. Partial withdrawal of commodities — Adjustment or substitution of receipt — Duties of warehouseman.** — When partial withdrawal of an agricultural commodity is made by a depositor, the warehouseman shall make appropriate notation thereof on the depositor's nonnegotiable receipt or on other records. If the warehouseman has issued a negotiable receipt to the depositor he shall claim, cancel, and replace it with a negotiable receipt showing the amount of the depositor's agricultural commodity remaining in the warehouse. For failure to claim and cancel a negotiable receipt which has been issued by him, a warehouseman shall be liable to anyone who purchases such receipt for value and in good faith, for failure to deliver all the agricultural commodity specified in the receipt, whether such purchaser acquired title to the negotiable receipt before or after delivery of any part of the agricultural commodity by the warehouseman. [I.C., § 69-237, as added by 1982, ch. 25, § 27, p. 32; am. 1983, ch. 44, § 13, p. 103; am. 1988, ch. 350, § 3, p. 1033.]

**69-238. Warehouseman's obligations — Duty to deliver deposited commodities — Damages.** — (1) The duty of the warehouseman to deliver agricultural commodities deposited shall be governed by the provisions of this chapter and the requirements of the uniform commercial code. Upon the return of a properly endorsed negotiable warehouse receipt to the warehouseman, and upon payment or tender of all advances and legal



charges, agricultural commodities of the grade and quantity named therein shall be delivered to the holder of the negotiable warehouse receipt, except as provided by the uniform commercial code.

(2) A warehouseman's duty to deliver any agricultural commodity is fulfilled if delivery is made pursuant to the contract with the depositor, or if no contract exists, then to the several owners in the order of demand as rapidly as it can be done by ordinary diligence. When delivery is made within thirty (30) days from date of demand, or as agreed upon in writing by all parties concerned, such delivery is deemed to comply with the provisions of this section. An extension of the delivery period may be granted by the department upon written request.

(3) A warehouseman shall not fail to deliver an agricultural commodity as provided in this section, and delivery shall be made at the warehouse or station where the agricultural commodity was received, unless otherwise agreed.

(4) In addition to being subject to penalties provided in this chapter for a violation of the provisions of this section, any warehouseman failing to deliver agricultural commodities within the time provided in this section is subject to suit by the person entitled to delivery of the agricultural commodities and may be ordered by a court of competent jurisdiction to pay actual damage or liquidated damages of one percent (1%) of the value for each day's delay. [I.C., § 69-238, as added by 1982, ch. 25, § 28, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 2001, ch. 304, § 5, p. 1102; am. 2002, ch. 259, § 27, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

#### **69-239. Duties of warehouseman — Contents of records. —**

(1) The warehouseman shall maintain current and complete records at all times with respect to all agricultural commodities handled, deposited, shipped or merchandised by him, including agricultural commodities owned by him. Such records shall include, but are not limited to, a daily position record showing the total quantity of each kind and class of agricultural commodity received and loaded out and the amount remaining on deposit at the close of each business day, and the warehouseman's total deposit obligation, including agricultural commodities owned by him, for each kind and class of agricultural commodity at the close of each business day.

(2) Every warehouseman purchasing any agricultural commodity from a depositor thereof shall promptly make and keep for five (5) years a correct record showing in detail the following information:

- (a) The name and address of the depositor;
- (b) The date purchased;
- (c) The terms of the sale; and
- (d) The quality and quantity purchased by the warehouseman and, where applicable, the dockage, tare, grade, size and net weight.



(3) Records required by this section shall be legible and kept in a place of safety in this state. If a person operates at more than one (1) location, records of each location's transactions must be identifiable. [I.C., § 69-239, as added by 1982, ch. 25, § 29, p. 32; am. 1988, ch. 350, § 3, p. 1033; am. 2001, ch. 304, § 6, p. 1102; am. 2002, ch. 259, § 28, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

#### JUDICIAL DECISIONS

**Cited in:** *Crown v. State*, 127 Idaho 175, 898 P.2d 1086 (1995).

**69-240. Director's discretionary action.** — Nothing in this chapter shall be construed to require the director or his authorized representative to report for prosecution or for the institution of civil action a violation of the provisions of this chapter when he believes that public interest will best be served by a suitable warning. [I.C., § 69-240, as added by 1982, ch. 25, § 30, p. 32.]

**69-241. Insurance — Cancellation procedure — Suspension of license.** — With the existence of an effective policy of insurance as required by section 69-206(1), Idaho Code, the insurance company involved shall be required to give ninety (90) days' advance notice to the department by registered or certified mail, return receipt requested, of cancellation of the policy. In the event of any cancellation, the department shall immediately terminate the license of such person without a hearing, and the termination shall be in effect until satisfactory evidence of the existence of an effective policy of insurance complying with the requirements of this chapter has been submitted to the department. [I.C., § 69-241, as added by 1982, ch. 25, § 31, p. 32; am. 1983, ch. 44, § 14, p. 103; am. 1985, ch. 138, § 7, p. 375; am. 2002, ch. 259, § 29, p. 756.]

**69-242. Injunction.** — Any violation of the provisions of this chapter or the rules promulgated hereunder may be enjoined upon complaint by the director. [I.C., § 69-242, as added by 1982, ch. 25, § 32, p. 32; am. 2002, ch. 259, § 30, p. 756.]

**69-243. Duty to prosecute.** — It shall be the duty of each prosecuting attorney to whom any violation is reported by the department to cause appropriate proceedings to be instituted and prosecuted without delay in a court of competent jurisdiction. [I.C., § 69-243, as added by 1982, ch. 25, § 33, p. 32; am. 2002, ch. 259, § 31, p. 756.]

**69-244. License reissuance following revocation.** — A warehouse license shall not be issued to any person whose license has been revoked

within a period of three (3) years from the date of such revocation. Upon proper application for a license following three (3) years from the date of revocation, the department shall hold a hearing within thirty (30) days from receipt of the application to determine if such license shall be issued. If, after the hearing, the department determines that it is in the best interests of the public, it may deny the issuance of a license to the applicant. Judicial review of the department's action may be sought. A change in a person's business name shall not absolve that person of a prior revocation of his warehouse license. [I.C., § 69-244, as added by 1982, ch. 25, § 34, p. 32; am. 1983, ch. 44; § 15, p. 103.]

**69-245. Director's authority.** — The director may, upon his own motion, whenever he has reason to believe the provisions of this chapter have been violated, or upon verified complaint of any person in writing, investigate the actions of any warehouseman licensed under the provisions of this chapter, and if he finds probable cause to do so, shall file a complaint against the warehouseman which shall be set down for hearing before the director upon thirty (30) days' notice served upon such license holder by personal service, registered mail or facsimile.

The director shall have the power to administer oaths, certify to all official acts and shall have the power to subpoena any person in this state as a witness; to compel through subpoena the production of books, papers, and records; and to take the testimony of any person on deposition in the same manner as prescribed by law in the procedure before the courts of this state. A subpoena issued by the director shall extend to all parts of the state and may be served by any person authorized to do so.

All powers of the director herein enumerated in respect to administering oaths, power of subpoena, and other powers in hearings on complaints shall likewise be applicable to hearings held on applications for the issuance, reinstatement or renewal of a warehouse license. [I.C., § 69-245, as added by 1982, ch. 25, § 35, p. 32; am. 2002, ch. 259, § 32, p. 756.]

**69-246. Appeals from decision of director.** — The director shall keep a complete transcript of all proceedings and evidence presented in any hearing before him. The applicant, warehouseman or any complainant formally appearing in a hearing before the director for a license, or the holder of any warehouse license suspended or revoked, or any party to a transfer application may appeal to the district court in accordance with the terms of chapter 52, title 67, Idaho Code. [I.C., § 69-246, as added by 1982, ch. 25, § 36, p. 32.]

**69-247. License denial.** — (1) Any person against whose warehouse bond or the commodity indemnity fund a claim has been ordered collected or has actually been collected shall not be licensed by the department for a period of three (3) years from the date of such order or collection. License denial may be waived if the person can show to the satisfaction of the director that full settlement of all claims against the bond and the commodity indemnity fund has been made. A change in a person's business

name shall not absolve any unsettled claim against that person's prior bond or the commodity indemnity fund.

(2) The director shall, after a public hearing, have the right to deny or refuse to issue a license, reinstatement or renewal thereof to an applicant when it is determined that public interest is best served by that denial or refusal.

(3) Upon refusal or denial pursuant to subsection (2) above, an applicant may reapply for a license, reinstatement or renewal after a period of ninety (90) days, at which time a new hearing will be held to review the application.

(4) The applicant shall have the right of appeal on any decision to refuse or deny a license under subsection (2) above to a court of competent jurisdiction. [I.C., § 69-247, as added by 1982, ch. 25, § 37, p. 32; am. 1983, ch. 44, § 16, p. 103; am. 2002, ch. 259, § 33, p. 756.]

**69-248. Drawing checks insufficiently covered a violation.** — Any person engaged in business as a warehouseman, as defined in this chapter, who shall make, draw, utter or deliver any check, draft or order for the payment of money upon any bank or other depository, in payment to the seller of the purchase price of any agricultural commodity or any part thereof or in compliance with a contract or to the department in payment of any fee, assessment or penalty, upon obtaining possession or control thereof, when at the time of such making, drawing, uttering or delivery the maker or drawer does not have sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation, shall violate the provisions of this chapter. The word "credit" as used herein shall mean an arrangement or understanding with the bank or depository for the payment of such check, draft or order. [I.C., § 69-248, as added by 1982, ch. 25, § 38, p. 32; am. 1985, ch. 138, § 8, p. 375; am. 1988, ch. 350, § 3, p. 1033; am. 2001, ch. 304, § 7, p. 1102; am. 2002, ch. 259, § 34, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

**69-249. Credit-sale contracts.** — (1) A warehouseman who purchases agricultural commodities by credit-sale contracts shall maintain books, records and other documents as required by the department to establish compliance with the provisions of this section.

(2) In addition to other information as may be required, a credit-sale contract shall contain or provide, but not be limited to:

- (a) The seller's name and address;
- (b) The conditions of delivery;
- (c) The amount, kind and class of agricultural commodities delivered;
- (d) The price per unit or basis of value;
- (e) The date payment is to be made; and



(f) Any enhancements to the value of the contract, which may include, but are not limited to, transportation, premiums of any nature, or producer provided services, must be listed separately and apart from the price per unit of the commodity.

(3) Title to all agricultural commodities sold by credit-sale contract is in the purchaser as of the time the contract is executed, unless the contract provides otherwise. The contract must be signed by both parties and executed in duplicate. One (1) copy shall be retained by the warehouseman and one (1) copy shall be delivered to the seller. Upon revocation or termination of a warehouseman's license, the payment date for all credit-sale contracts shall be advanced to a date not later than thirty (30) days following the effective date of the revocation or termination and the purchase price for all agricultural commodities without a price shall be determined as of the effective date of revocation or termination in accordance with all other provisions of the contract. In the event claims are submitted to the commodity indemnity fund following a declared failure, the value determination of contracts will be controlled by the provisions of section 69-262, Idaho Code, and the rules promulgated pursuant to the provisions of this chapter. However, if the business of the warehouseman is sold to another licensed warehouseman, credit-sale contracts may be assigned to the purchaser of the business. [I.C., § 69-249, as added by 1982, ch. 25, § 39, p. 32; am. 1983, ch. 44, § 17, p. 103; am. 1988, ch. 350, § 3, p. 1033; am. 2002, ch. 259, § 35, p. 756.]

**69-250. Confidential and protected records.** — Records required by the department including, but not limited to, production summaries, receiving records, conditioning reports, records relating to the payment of agricultural commodities, commodity indemnity fund and seed indemnity fund reporting forms of a warehouseman, and financial records that are required pursuant to section 69-206(6), Idaho Code, shall be held confidential and will be protected as production records according to chapter 3, title 9, Idaho Code. These records shall not be subject to disclosure unless specifically authorized in writing by the licensee or as otherwise authorized pursuant to the provisions of chapter 3, title 9, Idaho Code. [I.C., § 69-250, as added by 1982, ch. 25, § 40, p. 32; am. 1983, ch. 44, § 18, p. 103; am. 1990, ch. 213, § 104, p. 480; am. 2002, ch. 259, § 36, p. 756; am. 2003, ch. 150, § 5, p. 430.]

#### STATUTORY NOTES

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990. Section 6 of S.L. 2003, ch. 150 declared an emergency. Approved March 27, 2003.

**69-251. Payment of purchase price.** — A warehouseman shall pay to the depositor the purchase price for agricultural commodities upon deposit or demand by the depositor, but not later than thirty (30) days after deposit unless otherwise agreed by the parties in writing. As used in this section, "payment" means the actual payment or tender of payment by the ware-

houseman to the depositor of the agreed purchase price. [I.C., § 69-251, as added by 1983, ch. 44, § 19, p. 103; am. 1990, ch. 183, § 5, p. 399; am. 2001, ch. 304, § 8, p. 1102.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

#### **69-252 — 69-254. [Reserved.]**

**69-255. Short title — Indemnity fund program.** — (1) The provisions of this section and sections 69-256 through 69-267, Idaho Code, together with any definitions in this chapter, constitute the “Commodity Indemnity Fund Program.”

(2) The commodity indemnity fund program shall apply to entities governed by this chapter or governed by the provisions of the commodity dealer law as provided for in chapter 5, title 69, Idaho Code, referred to as “warehouses and/or dealers.” [I.C., § 69-255, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 1, p. 828; am. 1991, ch. 223, § 1, p. 532; am. 2001, ch. 304, § 9, p. 1102.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

**69-256. Creation of indemnity fund — Uses.** — (1) There is hereby established within the dedicated fund a fund to be known as the commodity indemnity fund. The commodity indemnity fund shall consist of assessments remitted by producers pursuant to the provisions of this chapter and any interest or earnings on the fund balance.

(2) All assessments shall be paid to the department and shall be deposited in the commodity indemnity fund. Assessments shall be paid solely by producers who deposit or deliver a commodity with a warehouse or sell to a dealer or warehouse. A delivery of commodity between producers, none of which are commodity dealers or warehousemen, is exempt from the collection and payment of assessment. The state treasurer shall be the custodian of the commodity indemnity fund. Disbursements shall be on authorization of the director. No appropriation is required for disbursements from this fund.

(3) The commodity indemnity fund and accruing interest shall be used exclusively for purposes of paying claimants pursuant to this chapter and chapter 5, title 69, Idaho Code, and paying necessary expenses and costs of administering the commodity indemnity fund. Provided however, that each year, accrued interest for that year shall be applied to pay necessary expenses and costs of administering the fund, regardless of the amount, to the extent of available accrued interest. In the event the accrued interest is



insufficient to pay the necessary expenses and costs of administering the fund in any particular year, then accrued interest shall first be applied to those costs and expenses. The remaining costs and expenses will be paid with principal from the commodity indemnity fund. In no event, however, shall payments from principal in any given year exceed the sum of two hundred fifty thousand dollars (\$250,000). The interest accumulated by the fund may be paid to the department and to the state treasurer to defray costs of administering the warehouse and dealer program and the commodity indemnity fund. The interest accumulated by the fund and, if necessary, a portion of the fund, may be used to defray the cost of reinsuring the fund at the discretion of the director. The state of Idaho shall not be liable for any claims presented against the fund. [I.C., § 69-256, as added by 1988, ch. 350, § 2, p. 1033; am. 1990, ch. 183, § 6, p. 399; am. 2001, ch. 304, § 10, p. 1102; am. 2002, ch. 259, § 37, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

**69-257. Assessment — Rate — Minimum and maximum assessment.** — (1) Every producer shall pay an assessment to the department for deposit in the commodity indemnity fund according to the provisions of this chapter and rules promulgated by the department to implement the provisions of this chapter.

(2) Except as provided in this subsection, the rate of the assessment shall be established by rules promulgated by the department. The producer's annual assessment shall not exceed two-tenths of one percent (.2%) of the total gross dollar amount, without deductions, due the producer, as determined at the time of first sale, of the commodities. [I.C., § 69-257, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 2, p. 828; am. 1990, ch. 183, § 7, p. 399; am. 2002, ch. 259, § 38, p. 756.]

**69-258. Collection and remittance of assessments — Principal amount held in trust — Interest earned — Failure to collect or remit assessments constitutes a violation — Interest and penalties for unpaid assessments.** — (1) The department shall promulgate rules to provide a procedure for the collection and remittance of the producer's assessments. Any warehouseman or dealer who owes producers for the sale or transfer of a commodity, or have stored for withdrawal a commodity, shall be responsible for the collection of the producer's assessments and the remittance of the assessments collected to the department.

(2) Warehousemen or dealers shall remit to the department assessments collected according to the provisions of this chapter. Payments will be made no later than the twentieth day of the month following the close of the calendar quarter on a form prescribed by the department. There are four (4) calendar quarters in the year, beginning on the first day of the months of January, April, July and October. Assessment reports shall be submitted



even though assessments for the period have not been collected. Failure to do so will result in a penalty of one hundred dollars (\$100).

(3) The principal amount of assessments paid by, or deducted from, payments to producers by warehousemen or dealers, are held in trust for the commodity indemnity fund immediately upon collection by any warehouseman or dealer and are not property of the warehouseman or dealer.

(4) Interest earned on assessments prior to remittance to the department belongs to the warehouseman or dealer.

(5) If a warehouseman or dealer fails to collect or remit assessments as required, it shall be considered a violation of this chapter and shall subject the warehouseman or dealer to suspension or revocation of any license issued to the warehouseman or dealer under the provisions of this chapter.

(6) The department shall collect, on assessments unpaid within the time limits specified in this chapter, interest at the rate of ten percent (10%) per annum until the assessments are remitted together with a penalty of five percent (5%) each month on the unpaid assessment due until the maximum penalty of twenty-five percent (25%) is reached. [I.C., § 69-258, as added by 2002, ch. 259, § 40, p. 756.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 69-258, which comprised I.C., § 69-258, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 3, p. 828; am. 1990, ch. 183, § 8, p. 399; am. 1991, ch. 223, § 2, p. 532; am. 2001, ch. 304, § 11, p. 1102, was repealed by S.L. 2002, ch. 259, § 39, effective July 1, 2002.

**69-259. Funding and limits of fund.** — The maximum amount of the commodity indemnity fund shall be maintained between ten million dollars (\$10,000,000) and twelve million dollars (\$12,000,000). [I.C., § 69-259, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 4, p. 828; am. 2001, ch. 304, § 12, p. 1102; am. 2002, ch. 259, § 41, p. 756.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

**69-260. Financial difficulties — Additional bond or security required.** — The department may, when it has reason to believe that a licensee does not have the ability to pay producers for commodities purchased, or when it determines that the licensee does not have a sufficient net worth to outstanding financial obligations ratio, require from the licensee the posting of a bond or other additional security in an amount to be prescribed by rule. The additional security may exceed the maximum amount set forth in this chapter. Failure of the licensee to timely post the additional bond or other security constitutes grounds for suspension or revocation of a license issued under this chapter. The licensee may request a hearing regarding the decision to increase the amount of security required or the revocation or suspension of a license pursuant to this section and may

appeal such decisions pursuant to the procedure set out in section 69-246, Idaho Code. [I.C., § 69-260, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 5, p. 828; am. 1990, ch. 183, § 9, p. 399.]

**69-261. Advisory committee — Terms — Compensation. —**

(1) There is hereby created a commodity indemnity fund advisory committee consisting of nine (9) members to be appointed by the director. Appointments shall be for up to three (3) year terms, each term ending on the same day of the same month as did the term preceding it. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of the predecessor's term.

(2) The committee shall be composed of six (6) producers primarily engaged in the production of commodities, and three (3) licensed bonded warehousemen or licensed commodity dealers.

(3) The committee shall meet at such places and times as it shall determine and as often as necessary to discharge the duties imposed upon it, provided, it shall meet not less than twice per year. Each committee member shall be compensated in accordance with section 59-509(o), Idaho Code, for travel and subsistence expense. The expenses of the committee and its operation shall be paid from the commodity indemnity fund.

(4) The committee shall have the power and duty to advise the director concerning assessments, administration of the commodity indemnity fund, and payment of claims from the fund. Every two (2) years the committee will review the maximum limits of the fund and give advice to the director. [I.C., § 69-261, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 6, p. 828; am. 1998, ch. 124, § 1, p. 460; am. 2002, ch. 259, § 42, p. 756; am. 2004, ch. 172, § 1, p. 550.]

**69-262. Proof of claims — Procedure — Hearing — Inspection of warehouse. —** In the event a warehouse or dealer fails, as defined in section 69-202(8), Idaho Code, the department shall process the claims of producers who have paid or owe assessments as required by this chapter. Claims against a failed warehouse or dealer shall include written evidence disclosing a storage obligation or a sale or delivery of commodities.

(1) The department shall give notice and provide a reasonable time of not less than thirty (30) days and not more than sixty (60) days to producers to file their written verified claims, including any written evidence, with the department.

(2) The department shall investigate each claim and shall notify each claimant, the warehouseman or dealer, and the advisory committee of the department's determination as to the validity and amount of each claimant's claim. A claimant or warehouseman or dealer may request a hearing on the department's determination within twenty (20) days of receipt of written notification and a hearing shall be held by the department pursuant to chapter 52, title 67, Idaho Code. Upon determining the amount and validity

of the claim, the director shall pay to the claimant an amount equal to ninety percent (90%) of the approved claim from the commodity indemnity fund. Prior to any payment from the fund to a claimant, the claimant shall be required to subrogate and assign his right to recover from any other source. The department may then pay up to ninety percent (90%) of the approved claim to the claimant. The department shall have a priority claim for that amount. The claimant shall be entitled to seek recovery of the remaining ten percent (10%) which was not originally assigned to the department. For the purpose of determining the amount of the producer's claim, the value of a producer's commodity shall be the lesser of: (a) the value of the commodity on the date the director declared the warehouse or dealer to have failed or to have failed to comply with the provisions of this chapter or rules promulgated thereunder; (b) the contract price as listed on a valid contract; or (c) the value of the commodity represented on the contract on the date the contract was signed. The value shall be determined by a survey of the available market price reports or markets of similar facilities within the same geographic location as the failed facility.

(3) The department may inspect and audit a failed warehouseman or dealer. In the event of a shortage, the department shall determine each producer's pro rata share of available commodities and the deficiency shall be considered as a claim of the producer. Each type of commodity shall be treated separately for the purpose of determining shortages.

(4) The director shall not approve or pay any claim made on the commodity indemnity fund if the claim is based on losses resulting from the deposit, sale or storage of commodities in an unlicensed warehouse or dealer.

(5) The fund shall not be liable for claims filed against a warehouse or dealer in good standing who has voluntarily relinquished their license if such claims are not filed with the department within six (6) months of the closing. [I.C., § 69-262, as added by 1988, ch. 350, § 2, p. 1033; am. 1989, ch. 320, § 7, p. 828; am. 1990, ch. 183, § 10, p. 399; am. 1991, ch. 223, § 3, p. 532; am. 1999, ch. 203, § 2, p. 547; am. 2001, ch. 304, § 13, p. 1102; am. 2002, ch. 259, § 43, p. 756.]

## STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

## JUDICIAL DECISIONS

### **Exhaustion of Administrative Remedies.**

Because the business failed to respond to the Idaho department of agriculture's notice of claimants and amounts of claims during the twenty-day period of subsection (2) of this section, it failed to exhaust the administrative remedy available to it under the statute;

the business was precluded from asserting its argument on appeal that the department incorrectly valued the amount of the claim. *State v. Curry Bean Co.*, 139 Idaho 789, 86 P.3d 503 (2004).

**Cited in:** *Griff, Inc. v. Curry Bean Co.*, 138 Idaho 315, 63 P.3d 441 (2003).



**69-263. Failure to file — Loss of claim on fund.** — If a producer, after notification, refuses or neglects to file in the office of the director his verified claim against a warehouseman or dealer as requested by the director within ninety (90) days from the date of the notice, the director shall thereupon be relieved of responsibility for taking action with respect to such claim later asserted and no such claim shall be paid from the commodity indemnity fund. No claim shall be paid from the fund if a producer files his claim more than two (2) years from the date of sale of the commodity. Provided however, for those claims that are based on contracts containing no readily calculable sale value of the commodity for the producer, no claim shall be paid from the fund if a producer files his claim more than one hundred eighty (180) days from the date the contract is executed. [I.C., § 69-263, as added by 1988, ch. 350, § 2, p. 1033; am. 1990, ch. 183, § 11, p. 399; am. 2001, ch. 304, § 14, p. 1102; am. 2002, ch. 259, § 44, p. 756; am. 2003, ch. 131, § 1, p. 384.]

#### STATUTORY NOTES

**Effective Dates.** — Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001. Section 2 of S.L. 2003, ch. 131 declared an emergency. Approved March 27, 2003.

**69-264. Minimum balance — Subsequent payments.** — The minimum balance in the commodity indemnity fund, which shall be used exclusively for purposes of paying claimants pursuant to this chapter and chapter 5, title 69, Idaho Code, shall be two hundred fifty thousand dollars (\$250,000). At no time shall the balance be allowed to fall below the minimum balance. The director may pay claims, on a pro rata basis if necessary, until the minimum balance is reached. If the director cannot fully pay a claim before the minimum balance is reached, he shall, when the commodity indemnity fund contains sufficient funds, pay off the claim. [I.C., § 69-264, as added by 1989, ch. 320, § 9, p. 828; am. 2001, ch. 304, § 15, p. 1102; am. 2002, ch. 259, § 45, p. 756.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 69-264, which comprised I.C., § 69-264, as added by 1988, ch. 350, § 2, p. 1033, was repealed by S.L. 1989, ch. 320, § 8. 1989, ch. 320 declared an emergency. Approved April 5, 1989. Section 16 of S.L. 2001, ch. 304 declared an emergency. Approved April 2, 2001.

**Effective Dates.** — Section 10 of S.L.

**69-265. Insufficient account balance — Payment priority.** [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 69-265, as added by 1988, ch. 350, § 2, p. 1033, was repealed by S.L. 1989, ch. 320, § 8.

**69-266. Payment from fund — Debt of warehouseman or dealer or surety — Reimbursement — Accrual of cause of action.** — Amounts paid from the commodity indemnity fund in satisfaction of any approved claim shall constitute a debt and obligation of the warehouseman, dealer, or surety against whom the claim was made. The director may bring suit on behalf of the commodity indemnity fund in the district court of Ada county to recover from the warehouseman, dealer, or surety the amount of the payment made from the commodity indemnity fund, together with costs and attorney's fees incurred in maintaining the suit. In the event the department initiates an action against a warehouseman, dealer, or surety the department's claim is deemed to accrue and relate back to the time that each producer who received a commodity indemnity fund payment incurred a loss in the facility. In no event shall a commodity indemnity fund payment be deemed to be beyond the reimbursement from the warehouseman, dealer, or surety merely because the payment may have occurred after the facility closed. Any recovery for reimbursement to the fund shall bear interest at the statutory rate from the date of failure. [I.C., § 69-266, as added by 1988, ch. 350, § 2, p. 1033; am. 1996, ch. 34, § 2, p. 86; am. 2002, ch. 259, § 46, p. 756.]

#### JUDICIAL DECISIONS

**Prevailing Party.**

Because the Idaho department of agriculture prevailed on appeal, it was awarded costs

and attorney fees pursuant to this section. *State v. Curry Bean Co.*, 139 Idaho 789, 86 P.3d 503 (2004).

**69-267. Claim against warehouseman or dealer — Director's remedies.** — The department may deny, suspend, or revoke the license of any warehouseman or dealer against whom a claim has been made, approved, and paid from the commodity indemnity fund. Proceedings for the denial, suspension, or revocation shall be subject to the provisions of title 67, chapter 52, Idaho Code. [I.C., § 69-267, as added by 1988, ch. 350, § 2, p. 1033; am. 2002, ch. 259, § 47, p. 756.]

### CHAPTER 3

#### TERMINAL ELEVATOR AND WAREHOUSE DISTRICTS

**69-301 — 69-328. Terminal elevator and warehouse districts. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This chapter, which comprised (1923, ch. 213, §§ 1-28, p. 349; I.C.A., §§ 67-301 — 67-328; am. 1967, ch.

272, § 30, p. 745; am. 1970, ch. 133, § 21, p. 309; am. 1970, ch. 176, § 3, p. 508) was repealed by S.L. 1982, ch. 24, § 1.

CHAPTER 4

STATEMENT OF INSURANCE UPON WITHDRAWAL OF GRAIN, BEANS OR PEAS  
FROM STORAGE

**69-401 — 69-403. Statement of insurance paid out by warehousemen given on withdrawal from storage. [Repealed.]**

STATUTORY NOTES

**Compiler's Notes.** — The following sections were repealed by S.L. 1995, ch. 56, § 1, effective July 1, 1995.

§ 69-401, which comprised 1933, ch. 92, § 1, p. 147.	§ 69-402, which comprised 1933, ch. 92, § 2, p. 147.
	§ 69-403, which comprised 1933, ch. 92, § 3, p. 147.

CHAPTER 5

COMMODITY DEALER LAW

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**69-501. Short title.** — This chapter shall be known as the "Commodity Dealer Law." [I.C., § 69-501, as added by 1982, ch. 94, § 2, p. 176.]

STATUTORY NOTES

**Cross References.** — Bonded warehouse law, §§ 69-201 — 69-251.

JUDICIAL DECISIONS

**Cited in:** Hieb v. Minnesota Farmers Union, 105 Idaho 694, 672 P.2d 572 (Ct. App. 1983).

**69-502. Definitions.** — As used in this chapter, except as otherwise specified:



(1) "Agricultural commodity" means any grain, wheat, barley, oats, corn, rye, oilseeds, dry edible beans, peas, lentils and other leguminous seeds and feeds (not including minerals or seed crops) or any other commodity as determined by the director.

(2) "Commodity dealer" or "dealer" means any person who solicits, contracts for, or obtains from an Idaho producer or producers, title, possession, or control of any agricultural commodity through his place of business located in the state of Idaho or through his place of business located outside the state of Idaho for the purpose of sale or resale or who buys, during any calendar year, at least ten thousand dollars (\$10,000) worth of agricultural commodities from an Idaho producer or producers of the commodities. Commodity dealer or dealer shall not mean any person who purchases agricultural commodities for his own use as seed or feed within his own operation.

(3) "Credit-sale contract" means a contract for the sale of an agricultural commodity pursuant to which the sale price is to be paid at a date subsequent to the delivery of the agricultural commodity to the buyer and includes, but is not limited to, those contracts commonly referred to as deferred payment contracts, deferred pricing contracts and price-later contracts.

(4) "Department" means the department of agriculture of the state of Idaho.

(5) "Director" means the director of the department of agriculture.

(6) "Person" means any individual, firm, association, partnership, corporation, or limited liability company.

(7) "Producer" means the owner, tenant or operator of land in this state who has an interest in the proceeds from the sale of agricultural commodities produced on that land. Producer does not include growers who sell their commodity to a facility in which they have a financial or management interest except members of a cooperative marketing association qualified under chapter 26, title 22, Idaho Code.

(8) "Public warehouse" or "warehouse" or "warehouseman" means any elevator, mill, warehouse, subterminal commodity warehouse, public warehouse or other structure or facility in which agricultural commodities are received for storage, shipment, processing, reconditioning or handling.

(9) "Revocation" means the permanent removal of a commodity dealer license following a hearing on violations of the provisions of this chapter by the hearing officer or director.

(10) "Suspension" means the temporary removal of a commodity dealer license by the department pending a hearing for violations of the provisions of this chapter. Correction of the violations prior to a hearing may result in the reinstatement of a license without a hearing.

(11) "Termination" means the expiration of a commodity dealer license due to failure to meet minimum licensing requirements, failure to renew a commodity dealer license or as requested by the licensee, unless a complaint has been filed against the licensee alleging a violation of any provision of this chapter. [I.C., § 69-502, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 1, p. 248; am. 1990, ch. 184, § 1, p. 407; am. 2002, ch. 258, § 1, p. 749.]

**69-503. License requirements — Financial responsibility.** — (1) A person shall not engage in the business of a commodity dealer in this state without having obtained a license issued by the department.

(2) The type of license required shall be determined as follows:

(a) A class 1 license is required if the commodity dealer purchases agricultural commodities by credit-sale contract or if the value of the agricultural commodities purchased by the commodity dealer from producers during the previous twelve (12) month period exceeds two hundred and fifty thousand dollars (\$250,000), or if the value of the agricultural commodities expected to be purchased by the commodity dealer from the producers during the succeeding twelve (12) month period will exceed two hundred and fifty thousand dollars (\$250,000). Any other commodity dealer may elect to be licensed as a class 1 commodity dealer.

(b) A class 2 license is required for any commodity dealer if the value of the agricultural commodities purchased by the commodity dealer from producers during the previous twelve (12) month period exceeds ten thousand dollars (\$10,000) and is less than two hundred and fifty thousand dollars (\$250,000), and if the value of the agricultural commodities expected to be purchased by the commodity dealer from producers during the succeeding twelve (12) month period will be more than ten thousand dollars (\$10,000) but less than two hundred and fifty thousand dollars (\$250,000). A class 2 licensee whose purchases from producers exceed two hundred and fifty thousand dollars (\$250,000) in value during any twelve (12) month [period] shall immediately apply for a class 1 license. If a class 1 license is denied, the person shall immediately cease doing business as a commodity dealer.

(3) An application for a license to engage in business as a commodity dealer shall be filed with the department and shall be on a form prescribed by the department. A separate license is required for each location at which records are maintained for transactions of the commodity dealer.

(4) A license application shall include the following:

(a) The name of the applicant;

(b) The names of the officers and directors if the applicant is a corporation;

(c) The names of the partners if the applicant is a partnership;

(d) The location of the principal place of business; and

(e) Any other reasonable information the department finds necessary to carry out the provisions and purposes of this chapter.

(5) A license applicant shall further provide a sufficient and valid bond as specified in section 69-506, Idaho Code.

(6) A license applicant shall further provide a complete financial statement setting forth the applicant's assets, liabilities and net worth. This financial statement shall be prepared by an independent certified public accountant or a licensed public accountant according to generally accepted accounting principles. The commodity dealer shall have and maintain current assets equal to or greater than current liabilities. Assets shall be shown at original cost less depreciation. Upon written request filed with the department, the director may allow asset valuations in accordance with a competent appraisal.



(7) In order to receive and retain a commodity dealer's license the following additional conditions must be satisfied:

(a) For a class 1 license a commodity dealer shall have and maintain a net worth of at least fifty thousand dollars (\$50,000) or maintain a bond in the amount of two thousand dollars (\$2,000) for each one thousand dollars (\$1,000) or fraction thereof of net worth deficiency; however, a person shall not be licensed as a class 1 commodity dealer if the person has a net worth of less than twenty-five thousand dollars (\$25,000). A bond submitted for purposes of this subsection shall be in addition to any bond otherwise required under the provisions of this chapter.

(b) For a class 2 license a commodity dealer shall have and maintain a net worth of at least twenty-five thousand dollars (\$25,000) or maintain a bond in the amount of two thousand dollars (\$2,000) for each one thousand dollars (\$1,000) or fraction thereof of net worth deficiency; however, a person shall not be licensed as a class 2 commodity dealer if the person has a net worth of less than ten thousand dollars (\$10,000). A bond submitted for purposes of this subsection shall be in addition to any bond otherwise required under the provisions of this chapter.

(8) The department may require additional information or verification regarding the financial resources of the applicant and the applicant's ability to pay producers for agricultural commodities purchased from them. [I.C., § 69-503, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 2, p. 248; am. 1990, ch. 184, § 2, p. 407.]

**69-504. License issuance — Renewal — Expiration.** — (1) The department shall issue a license when the applicant has filed the application and complied with the terms and conditions of the provisions of this chapter and the rules of the department. The license shall expire on December 31 of each year.

(2) A commodity dealer's license may be renewed annually by submitting all necessary licensing materials required by the provisions of this chapter. This material shall be received by the department before December 31 of each year.

(3) A commodity dealer's license which has expired may be reinstated by the department upon receipt of all necessary licensing materials required by the provisions of this chapter and a reinstatement fee in the amount of five hundred dollars (\$500); providing, that this material is filed within thirty (30) days from the date of expiration of the commodity dealer's license. At the end of the thirty (30) day reinstatement period, a commodity dealer's license shall terminate. All license applications received after the thirty (30) day reinstatement period shall be considered original applications and, after the five hundred dollar (\$500) reinstatement fee has been remitted to the department, license fees shall be assessed according to section 69-508(1), Idaho Code.

(4) A license may terminate upon request of the licensee unless a complaint has been filed against the licensee alleging a violation of any provision of this chapter. A commodity dealer's license is not transferable between legal entities.



(5) If an applicant has had a license revoked under the provisions of chapter 2 or 5, title 69, Idaho Code, or the United States warehouse act within the past three (3) years or been convicted of a violation of the provisions of chapter 2 or 5, title 69, Idaho Code, or the United States warehouse act within the past three (3) years, the department may deny a commodity dealer's license to the applicant.

(6) Any partnership with a partner or any corporation, limited liability company or any association which has an officer, director or majority stockholder owning at least ten percent (10%) of issued stock who has had a license revoked under the provisions of chapter 2 or 5, title 69, Idaho Code, or the United States warehouse act within the previous three (3) years or has been convicted of a felony involving violations of the provisions of chapter 2 or 5, title 69, Idaho Code, or the United States warehouse act, may be denied a commodity dealer's license by the department. [I.C., § 69-504, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 3, p. 248; am. 2002, ch. 258, § 2, p. 749.]

#### STATUTORY NOTES

**Federal References.** — The United States Warehouse Act, referred to in subsection (5), is compiled as 7 U.S.C., § 241 et seq.

**69-505. Exemptions.** — Any person currently licensed under chapter 2, title 69, Idaho Code, is exempt from the licensing provisions of this chapter. [I.C., § 69-505, as added by 1982, ch. 94, § 2, p. 176.]

**69-506. Bonding requirements — Cancellation — Irrevocable letter of credit or certificate of deposit in lieu of bond — Single bond.** — Except as provided in chapter 2, title 69, Idaho Code, an applicant for a license to operate as a commodity dealer shall, before a license will be issued, file with the department a bond in favor of the commodity indemnity fund with a corporate surety approved by the department with the condition that the applicant will pay the purchase price of any agricultural commodity to the seller. The aggregate annual liability of the surety shall in no event exceed the sum of the bond.

At the discretion of the director, any person required to submit a bond to the department in accordance with this chapter, may give to the department a certificate of deposit or irrevocable letter of credit payable to the commodity indemnity fund in lieu of the bond required herein. The principal amount of the certificate of deposit or irrevocable letter of credit shall be the same as that required for a surety bond pursuant to this chapter. Accrued interest upon the certificate of deposit shall be payable to the purchaser of the certificate. The certificate of deposit or irrevocable letter of credit shall remain on file with the department until it is released, canceled or discharged by the director. The provisions of this chapter that apply to a bond required pursuant to this chapter apply to each certificate of deposit or irrevocable letter of credit given in lieu of such bond. The certificate of deposit or irrevocable letter of credit shall remain on file with the depart-

ment until it is released, canceled, or discharged by the director, or until the director is notified ninety (90) days in advance, by registered or certified mail, return receipt requested, that the certificate of deposit or irrevocable letter of credit is renewed, canceled or amended. Failure to notify the director may result in the suspension or revocation of the commodity dealer's license. Under the provisions of this chapter, an irrevocable letter of credit or certificate of deposit shall not be accepted unless it is issued by a national bank or federal thrift institution in Idaho or by a state-chartered bank or thrift institution authorized to conduct business in Idaho and insured by the federal deposit insurance corporation. A certificate of deposit shall be submitted with an audited or reviewed financial statement prepared in accordance with the rules of the department by an independent Idaho certified public accountant or Idaho licensed public accountant.

The amount of bond to be furnished for each commodity dealer shall be fixed at whichever of the following amounts is greater:

- (1) The combined total indebtedness paid and owed to producers for agricultural commodity and seed crop for the previous license year; or
- (2) The indebtedness owed and estimated to be owed to producers for agricultural commodity and seed crop for the current license year.

Subsequent to determining whichever of the preceding amounts is greater, and based on that amount, the amount of bond shall be calculated as follows:

Gross Dollars:	Amount of Bond:
\$0 - \$450,000	\$20,000 bond or 6% of the gross dollars, whichever is less
\$450,001 - \$1,000,000	\$40,000 bond
\$1,000,001 - \$8,000,000	\$100,000 bond
Over \$8,000,000	\$500,000 bond

In any case, the amount of the bond shall not be more than five hundred thousand dollars (\$500,000). A surety shall notify the commodity dealer and the department by certified mail at least ninety (90) days prior to the cancellation of a bond issued under the provisions of this chapter. The liability of the surety shall cover purchases made by the commodity dealer during the time the bond is in force. A commodity dealer's bond filed with this department shall be continuous until canceled by the surety upon ninety (90) days' notice. The director reserves the right to waive the ninety (90) day cancellation period.

If a commodity dealer is licensed pursuant to chapter 51, title 22, Idaho Code, that same commodity dealer may obtain a single bond, certificate of deposit or irrevocable letter of credit as a surety under chapter 5, title 69, Idaho Code, and chapter 51, title 22, Idaho Code. If a single bond, certificate of deposit or irrevocable letter of credit is written covering chapter 5, title 69, Idaho Code, and chapter 51, title 22, Idaho Code, the bond, certificate of deposit or irrevocable letter of credit shall be made out in favor of the commodity indemnity fund and the seed indemnity fund. In the event a commodity dealer fails as defined in section 69-202(8), Idaho Code, and a single bond, certificate of deposit or irrevocable letter of credit is written in



favor of the commodity indemnity fund and seed indemnity fund, the proceeds of the bond, certificate of deposit or irrevocable letter of credit will be allocated based on the dollar amount of the verified claims approved pursuant to chapter 2, title 69, Idaho Code, and chapter 51, title 22, Idaho Code. [I.C., § 69-506, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 4, p. 248; am. 1985, ch. 139, § 1, p. 382; am. 1988, ch. 350, § 4, p. 1033; am. 1990, ch. 184, § 3, p. 407; am. 1992, ch. 44, § 2, p. 145; am. 2002, ch. 258, § 3, p. 749; am. 2003, ch. 149, § 1, p. 426.]

#### STATUTORY NOTES

**Effective Dates.** — Section 5 of S.L. 2003, ch. 149 declared an emergency. Approved March 27, 2003.

**69-507. Suspension or revocation of a license.** — The director may, after opportunity for hearing has been afforded to the licensee concerned, suspend or revoke any license issued to any commodity dealer under the provisions of this chapter for any violation of or failure to comply with any provisions of this chapter or the rules and regulations made hereunder. Pending investigation, the director whenever he deems necessary may temporarily suspend a license without a hearing. [I.C., § 69-507, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 5, p. 248.]

**69-508. License fees.** — (1) The department shall assess and collect an annual fee for each commodity dealer's license on an original application according to the following schedule:

(a) For a class 1 license the fee shall be three hundred sixty dollars (\$360).

(b) For a class 2 license the fee shall be one hundred eighty dollars (\$180).

(2) The department shall assess and collect an annual fee for the renewal of each commodity dealer's license according to the following schedule:

(a) For a class 1 license the renewal fee shall be sixty-five dollars (\$65.00).

(b) For a class 2 license the renewal fee shall be thirty-five dollars (\$35.00).

(3) All license fees, assessments and moneys collected by the director under the provisions of this chapter shall be deposited into the commodity indemnity fund to be used for the purposes set forth in section 69-256, Idaho Code. [I.C., § 69-508, as added by 1982, ch. 94, § 2, p. 176; am. 2002, ch. 258, § 4, p. 749.]

**69-509. Posting of license.** — The commodity dealer's license shall be posted in a conspicuous location at his place of business. [I.C., § 69-509, as added by 1982, ch. 94, § 2, p. 176.]

**69-510. Payment of purchase price.** — A person required to be licensed as a commodity dealer under the provisions of this chapter shall pay the purchase price to the owner or his agent for agricultural commodities upon delivery or demand by the owner or agent, but not later than



thirty (30) days after delivery by the owner or agent, unless otherwise agreed to by the parties in writing. As used in this section, "delivery" means the transfer of title to and possession of agricultural commodities by the owner or agent to the commodity dealer or to another person in accordance with the agreement of the owner or agent and the commodity dealer. As used in this section, "payment" means the actual payment or tender of payment by the commodity dealer to the owner or agent of the agreed purchase price. [I.C., § 69-510, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 6, p. 248; am. 1990, ch. 184, § 4, p. 407; am. 2002, ch. 258, § 5, p. 749.]

**69-511. Inspection of premises, books and records — Authorization to copy.** — The department may inspect the premises used by any commodity dealer in the conduct of his business at any reasonable time. The department is authorized through officials, employees, or agents of the department designated by it, to examine all books, accounts, records and papers pertaining to any commodity or seed crop purchased, contracted for, or in the possession of, any commodity dealer licensed under the provisions of this chapter. A commodity dealer licensed in this state who does not have a place of business within the state shall, upon the request of the director, make available and furnish to the department at any reasonable time and place the department may set, all books, accounts, records and papers relating to agricultural commodity transactions within the state of Idaho. Where there is good cause to believe that a person is doing business as a commodity dealer in the state of Idaho without a license, the department may inspect the books, papers and records of the person which pertain to agricultural commodity purchases. The department is authorized to make copies of any documents or records relevant to compliance with the provisions of this chapter. [I.C., § 69-511, as added by 1982, ch. 94, § 2, p. 176; am. 1990, ch. 184, § 5, p. 184; am. 2002, ch. 258, § 6, p. 749; am. 2003, ch. 149, § 2, p. 426.]

#### STATUTORY NOTES

**Effective Dates.** — Section 5 of S.L. 2003, ch. 149 declared an emergency. Approved March 27, 2003.

**69-512. Penalties.** — (1) Any person who engages in business as a commodity dealer without obtaining a license or who refuses to permit inspection of licensed premises, books, accounts, records or other documents required by the provisions of this chapter or who uses a scale ticket or credit-sale contract that fails to satisfy the requirements of the provisions of this chapter shall be guilty of a felony and be punished by imprisonment for not more than ten (10) years, or by a fine of not more than ten thousand dollars (\$10,000), or both.

(2) Any person who knowingly submits false information to or who knowingly withholds information from the department when such information is required to be submitted or maintained pursuant to the provisions of this chapter shall be guilty of a felony and be punished by imprisonment for

not more than ten (10) years, or by a fine of not more than ten thousand dollars (\$10,000), or both.

(3) Any person who shall misrepresent, forge, alter or counterfeit a license required by the provisions of this chapter, or who shall issue, utter or aid in the issuance or utterance or attempt to issue or utter a false or fraudulent receipt for any commodity shall be guilty of a felony and be punished by imprisonment for not more than ten (10) years, or by a fine of not more than ten thousand dollars (\$10,000), or both.

(4) Any violation of the provisions of this chapter except as provided in subsections (1), (2) or (3) of this section or section 69-520, Idaho Code, shall be a misdemeanor and punishable by imprisonment in a county jail for not more than six (6) months, or by a fine of not more than one thousand dollars (\$1,000), or by both. [I.C., § 69-512, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 7, p. 248.]

**69-513. Injunction.** — Any violation of the provisions of this chapter or any violation involving the business of a commodity dealer may be enjoined upon complaint by the director. [I.C., § 69-513, as added by 1982, ch. 94, § 2, p. 176.]

**69-514. Credit-sale contracts.** — (1) A commodity dealer who purchases agricultural commodities by credit-sale contracts shall maintain books, records and other documents as required by the department to establish compliance with the provisions of this section.

(2) In addition to other information as may be required, a credit-sale contract shall contain or make provision for all of the following:

- (a) The seller's name and address;
- (b) The conditions of delivery;
- (c) The amount and kind of agricultural commodities delivered;
- (d) The price per unit or basis of value; and
- (e) The date payment is to be made.

(3) Title to all agricultural commodities sold by a contract is in the purchasing dealer as of the time the contract is signed, unless the contract provides otherwise. The contract must be signed by all parties and executed in duplicate. One (1) copy shall be retained by the commodity dealer and one (1) copy shall be delivered to the seller. Upon revocation or termination of a commodity dealer's license, the payment date for all credit-sale contracts shall be advanced to a date not later than thirty (30) days following the effective date of the revocation or termination and the purchase price for all agricultural commodities without a price shall be determined as of the effective date of revocation or termination in accordance with all other provisions of the contract. However, if the business of the commodity dealer is sold to another licensed commodity dealer, credit-sale contracts may be assigned to the purchaser of the business. [I.C., § 69-514, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 8, p. 248; am. 1990, ch. 184, § 6, p. 407.]

**69-515. Confidential and protected records.** — Records required by the department including, but not limited to, production summaries, receiv-



ing records, conditioning reports, records relating to the payment of agricultural commodities, commodity indemnity fund and seed indemnity fund reporting forms of a commodity dealer, and financial records that are required pursuant to sections 69-503(6) and 69-521, Idaho Code, shall be held confidential and will be protected as production records according to chapter 3, title 9, Idaho Code. These records shall not be subject to disclosure unless specifically authorized in writing by the licensee or as otherwise authorized pursuant to the provisions of chapter 3, title 9, Idaho Code. [I.C., § 69-515, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 9, p. 248; am. 1990, ch. 213, § 105, p. 480; am. 2002, ch. 258, § 7, p. 749; am. 2003, ch. 149, § 3, p. 426.]

#### STATUTORY NOTES

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990. Section 5 of S.L. 2003, ch. 149 declared an emergency. Approved March 27, 2003.

**69-516. Standardization of records and documents.** — The department may adopt rules specifying the form and content of scale tickets and credit-sale contracts. [I.C., § 69-516, as added by 1982, ch. 94, § 2, p. 176; am. 2002, ch. 258, § 8, p. 749.]

**69-517. Director's authority.** — The director may, upon his own motion, whenever he has reason to believe the provisions of this chapter have been violated, or upon verified complaint of any person in writing, investigate the actions of any commodity dealer licensed under the provisions of this chapter, and if he finds probable cause to do so, shall file a complaint against said commodity dealer which shall be set down for hearing before the director upon thirty (30) days' notice served upon such license holder either by personal service, registered mail or facsimile prior to such hearing.

The director shall have the power to administer oaths, certify to all official acts and shall have the power to subpoena any person in this state as a witness, to compel through subpoena the production of books, papers and records, and to take the testimony of any person on deposition in the same manner as is prescribed by law in the procedure before the courts of this state. A subpoena issued by the director shall extend to all parts of the state and may be served by any person authorized to do so.

All powers of the director herein enumerated in respect to administering oaths, power of subpoena, and other enumerated powers in hearings on complaints shall likewise be applicable to hearings held on applications for the issuance or renewal of a commodity dealer's license.

Nothing in this chapter shall be construed to require the director or his authorized representative to report for prosecution or to institute civil, criminal or administrative action against a commodity dealer for a violation of the provisions of this chapter when he believes that public interest will best be served by a suitable warning or other administrative action. The



director shall maintain a record of any administrative action involving a commodity dealer with that commodity dealer's license file. [I.C., § 69-517, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 10, p. 248; am. 2002, ch. 258, § 9, p. 749.]

**69-518. Appeals from decision of director.** — The director shall keep a complete transcript of all proceedings and evidence presented in any hearing before him. The commodity dealer or applicant thereof, or any protestant formally appearing at a hearing before the director for such license, or the holder of any commodity dealer license suspended or revoked, or any party to a transfer application may appeal to the district court in accordance with the terms of chapter 52, title 67, Idaho Code. [I.C., § 69-518, as added by 1982, ch. 94, § 2, p. 176.]

**69-519. License denial.** — (1) Any person against whose commodity dealer bond a claim has been ordered collected or has actually been collected shall not be licensed by the department for a period of three (3) years from the date of such order or collection. License denial may be waived if the person can show to the satisfaction of the director that full settlement of all claims against the bond has been made. A change in a person's business name shall not absolve any unsettled claim against that person's prior bond.

(2) The director shall, after a public hearing, have the right to deny or refuse to issue a license or renewal thereof to an applicant when it is determined that public interest is best served by that denial or refusal.

(3) Upon refusal or denial of a license pursuant to subsection (2) of this section, an applicant may reapply for a license or renewal after a period of ninety (90) days at which time a new hearing will be held to review the application.

(4) The applicant shall have the right of appeal on any decision to refuse or deny a license under subsection (2) of this section to a court of competent jurisdiction. [I.C., § 69-519, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 11, p. 248.]

**69-520. Drawing checks insufficiently covered a violation.** — Any person engaged in business as a commodity dealer, as defined in this chapter, who shall make, draw, utter or deliver any check, draft or order for the payment of money upon any bank or other depository in payment to the seller of the purchase price of any agricultural commodity or any part thereof upon obtaining possession or control thereof, when at the time of such making, drawing, uttering or delivery the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft or order in full upon its presentation, shall be in violation of the provisions of this chapter. The word "credit" as used herein shall mean an arrangement or understanding with the bank or depository for the payment of such check, draft or order. [I.C., § 69-520, as added by 1982, ch. 94, § 2, p. 176; am. 1983, ch. 116, § 12, p. 248; am. 1990, ch. 184, § 7, p. 407.]

## STATUTORY NOTES

**Compiler's Notes.** — Section 3 of S.L. 1982, ch. 94 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such

provision to any person or circumstance is declared invalid for any reason, such declaration shall not affect the validity of remaining portions of this act."

**69-521. Financial statements.** — In order to obtain a commodity dealer's license, the applicant shall submit an audited or reviewed financial statement prepared by an independent certified public accountant or licensed public accountant, a statement of current assets and current liabilities and a statement of net worth, all of which shall be prepared in accordance with generally accepted accounting principles. This statement must have been prepared not more than ninety (90) days prior to the date of application and shall conform to the applicable requirements of this chapter as to annual financial statements.

Once licensed, every licensee shall annually prepare a financial statement either at the close of business, December 31, or at the end of their fiscal year and file the statement with the department not later than ninety (90) days thereafter. These statements shall be prepared in conformity with generally accepted accounting principles and shall include, but not be limited to, a reviewed financial statement prepared by an independent certified public accountant or licensed public accountant, a statement of current assets and current liabilities, and a statement of net worth. [I.C., 69-521, as added by 1983, ch. 116, § 13, p. 248; am. 1989, ch. 300, § 3, p. 747; am. 1990, ch. 184, § 8, p. 407; am. 2002, ch. 258, § 10, p. 749.]

**69-522. Action on bond, certificate of deposit or irrevocable letter of credit by producers injured.** — Any producer injured by the breach of any obligation for which a bond, certificate of deposit or irrevocable letter of credit is written, under the provisions of section 69-506, Idaho Code, must petition the director to make demand upon the commodity dealer, certificate of deposit, irrevocable letter of credit or bond. The director may thereupon make demand for payment of such damages and in the event such damages are not promptly paid the director may commence an action to enforce payment of such damages. The liability of the bank on a certificate of deposit or irrevocable letter of credit, and the surety upon the bond required to be given by a commodity dealer as provided by section 69-506, Idaho Code, for any one (1) annual licensing period shall be limited to the amount specified in the bond, certificate of deposit, or irrevocable letter of credit and in case of recoveries had by two (2) or more producers for violation of the conditions of this chapter in excess of the amount of the bond, certificate of deposit, or irrevocable letter of credit, such recovery shall be prorated and the total recovery for any one (1) annual licensing period shall not exceed the amount of the bond, certificate of deposit, or irrevocable letter of credit. In the event the director sues and obtains a judgment against the commodity dealer and/or his surety or bank for payment of such damages under this chapter, he shall be entitled to recover a reasonable attorney's fee. [I.C., § 69-522, as added by 1983, ch. 116, § 14, p. 248; am. 1990, ch.

184, § 9, p. 407; am. 2002, ch. 258, § 11, p. 749; am. 2003, ch. 149, § 4, p. 426.]

## STATUTORY NOTES

**Effective Dates.** — Section 5 of S.L. 2003, ch. 149 declared an emergency. Approved March 27, 2003.

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Cancelled bond.  
Retention of collateral.

#### Cancelled Bond.

The fact that bond had been cancelled did not terminate surety's liabilities under the provisions of former similar section since surety would be liable for any unsettled obligations incurred by principal during the life of the bond. *Luzar v. Western Sur. Co.*, 106 Idaho 1, 674 P.2d 430 (Ct. App. 1983), rev'd on other grounds, 107 Idaho 693, 692 P.2d 337 (1984).

#### Retention of Collateral.

Where surety, under collateral agreements, had right to retain collateral until principal's liability ceased and surety retained the right

to demand the type of evidence to be furnished to establish the lack of any liability on its part for principal's activities during the period of the bond's life, the offer by principal to submit evidence that its customers had been paid, together with affidavits to that effect from all its customers with whom it had done business for the last two years was insufficient to establish lack of liability and surety was not guilty of conversion by retaining collateral. *Luzar v. Western Sur. Co.*, 106 Idaho 1, 674 P.2d 430 (Ct. App. 1983), rev'd on other grounds, 107 Idaho 693, 692 P.2d 337 (1984).

**69-523. Publication of reports.** — The department of agriculture may publish the results of any investigations made under the provisions of this chapter and may publish the names and addresses of persons licensed under this chapter and a list of all licenses terminated under this chapter and the causes therefor. [I.C., § 69-523, as added by 1983, ch. 116, § 15, p. 248.]

**69-524. Rules.** — The department of agriculture shall make such rules as it may deem necessary for the efficient execution of the provisions of this chapter. [I.C., § 69-524, as added by 1983, ch. 116, § 16, p. 248; am. 2002, ch. 258, § 12, p. 749.]

**69-525. Duty to prosecute.** — It shall be the duty of each prosecuting attorney to whom any violation is reported by the department to cause appropriate proceedings to be instituted and prosecuted without delay in a court of competent jurisdiction. [I.C., § 69-525, as added by 1983, ch. 116, § 17, p. 248; am. 2002, ch. 258, § 13, p. 749.]

## JUDICIAL DECISIONS

**Cited in:** *Hieb v. Minnesota Farmers Union*, 105 Idaho 694, 672 P.2d 572 (Ct. App. 1983).



**69-526. Cooperation with governmental agencies and private associations.** — The director may cooperate with and enter into agreements with governmental agencies of this state, other states, agencies of the federal government, and private associations in order to carry out the purpose and provisions of this chapter and the United States warehouse act (7 U.S.C.A. section 241, et seq.). Notwithstanding any other provisions of this chapter, such agreements may also relate to a joint program for licensing, bonding and inspecting stations. Such a program should be designed to avoid duplication of effort on the part of the licensing authority and requirements for operation, and promote more efficient enforcement of the provisions of this chapter and comparable provisions of the laws of the states of Oregon, Washington, Montana, Wyoming, Utah and Nevada and the province of British Columbia, Canada. [I.C., § 69-526, as added by 1990, ch. 184, § 10, p. 407.]

# TITLE 70

## WATERCOURSES AND PORT DISTRICTS

### CHAPTER.

1. PORT DISTRICTS. [REPEALED.]
2. COEUR D'ALENE RIVER AND LAKE COMMISSION, §§ 70-201 — 70-208.
3. SNAKE RIVER IMPROVEMENTS, §§ 70-301 — 70-306.
4. BOISE RIVER IMPROVEMENTS, §§ 70-401 — 70-406.
5. OUTLET CONTROL STRUCTURES, §§ 70-501 — 70-507.
- 6-10. [RESERVED.]
11. PORT DISTRICTS — FORMATION — ANNEXATION — DISINCORPORATION, §§ 70-1101 — 70-1114.
12. PORT DISTRICTS — ELECTION OF PORT COMMISSIONERS, §§ 70-1201 — 70-1220.
13. PORT DISTRICTS — REVISION OF COMMISSIONER DISTRICTS, §§ 70-1301 — 70-1303.
14. PORT DISTRICTS — COMMISSIONS IN GENERAL, §§ 70-1401 — 70-1410.

### CHAPTER.

15. PORT DISTRICTS — POWERS, §§ 70-1501 — 70-1512.
16. PORT DISTRICTS — FURTHER POWERS AND PROCEDURES — HARBOR IMPROVEMENT PLANS, §§ 70-1601 — 70-1620.
17. PORT DISTRICTS — BUDGET AND FISCAL MATTERS, §§ 70-1701 — 70-1721.
18. PORT DISTRICTS — REVENUE BONDS AND WARRANTS, §§ 70-1801 — 70-1809.
19. INDUSTRIAL DEVELOPMENT DISTRICTS IN PORT DISTRICTS, §§ 70-1901 — 70-1913.
20. PORT DISTRICTS — MISCELLANEOUS PROVISIONS, §§ 70-2001 — 70-2004.
21. IDAHO PORT DISTRICT ECONOMIC DEVELOPMENT FINANCING ACT, §§ 70-2101 — 70-2117.
22. COUNTY-BASED INTERMODAL COMMERCE AUTHORITY, §§ 70-2201 — 70-2213.

## CHAPTER 1

### PORT DISTRICTS

### 70-101 — 70-137. Formation, regulation and government of port districts. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — These sections, comprising 1931, ch. 201, §§ 1-25, p. 351; I.C.A., §§ 68-101 — 68-125; 1959, ch. 46, §§ 1-7, p. 90; 1961, ch. 260, §§ 1-17, p. 435; 1964 (E.S.),

ch. 6, § 1, p. 16; 1965, ch. 48, § 1, p. 74; 1965, ch. 141, § 1, p. 275, were repealed by S.L. 1969, ch. 55, § 126.

## CHAPTER 2

### COEUR D'ALENE RIVER AND LAKE COMMISSION

### SECTION.

- 70-201. Commission created.
- 70-202. Organization — Claims for expenses.
- 70-203. Time and place of meeting.
- 70-204. Duties of commission — Report to legislature.

### SECTION.

- 70-205. Hearings before commission.
- 70-206. Services and assistance.
- 70-207. Salary and expenses.
- 70-208. Allowance of claims.

**70-201. Commission created.** — A commission of three (3) members is hereby created to be known and designated as the "Coeur d'Alene River and Lake Commission." Said commission shall consist of the chairman of the boards of county commissioners of Kootenai and Shoshone counties in this state and the attorney general of the state of Idaho. A majority of said commission shall constitute a quorum for the transaction of business. [1931, ch. 199, § 1, p. 348; I.C.A., § 68-201.]

## STATUTORY NOTES

**Cross References.** — Navigation not to be impaired by irrigation district law, § 43-1501.

**70-202. Organization — Claims for expenses.** — The members of said commission shall meet and effect an organization by electing a chairman and secretary from its membership. Said commission shall pass upon all claims for expenses incurred under the provisions of this chapter, and shall either approve or disapprove the same; and all such claims approved by it shall be by it presented to the state board of examiners as hereinafter provided for. [1931, ch. 199, § 2, p. 348; I.C.A., § 68-202.]

## STATUTORY NOTES

**Cross References.** — Navigation not to be impaired by irrigation district law, § 43-1501.

**70-203. Time and place of meeting.** — Said commission shall meet at such times and places as may be designated by the chairman. [1931, ch. 199, § 3, p. 348; I.C.A., § 68-203.]

**70-204. Duties of commission — Report to legislature.** — The duties of said commission shall be to study and investigate ways and means of eliminating from the Coeur d'Alene River and Coeur d'Alene Lake, so far as practicable, all industrial wastes which pollute or tend to pollute the same, and to determine and recommend methods of preventing pollution detrimental to vegetation and domestic crops; to public health or to the health of animals, fish or aquatic life, or detrimental to the use of waters for recreational purposes, and in the performance of such duties, the commission shall have the power to investigate the character of all waste discharged into or deposited on the banks of the said waters. A report of the findings and recommendations of the commission shall be made to the twenty-second legislature of the state of Idaho for its information. [1931, ch. 199, § 4, p. 348; I.C.A., § 68-204.]

**70-205. Hearings before commission.** — The said commission shall have the power to hold hearings, require the attending of witnesses and take testimony whenever it shall be deemed necessary in carrying out the provisions of this chapter. Any commissioner is hereby authorized and empowered to administer oaths to any witnesses called to testify in any hearing or proceeding before such commission. Witnesses' fees and mileage of such witnesses shall be the same as allowed to witnesses subpoenaed in civil cases in the district courts in this state. [1931, ch. 199, § 5, p. 348; I.C.A., § 68-205.]



## STATUTORY NOTES

**Cross References.** — Witness fees and mileage, § 9-1601 et seq.

**70-206. Services and assistance.** — Said commission may require the services and assistance of the state chemist and sanitary engineer and may employ such other competent technical assistance as it may require. [1931, ch. 199, § 6, p. 348; I.C.A., § 68-206.]

**70-207. Salary and expenses.** — No official or employee of the state of Idaho, or any county thereof, shall receive any compensation in addition to his salary, either as a member of said commission or an employee thereof, and the hotel and traveling expense of the members of this commission from Kootenai and Shoshone counties shall be borne by the said counties. [1931, ch. 199, § 7, p. 348; I.C.A., § 68-207.]

**70-208. Allowance of claims.** — All claims for expenses incurred under the provisions of this chapter shall be made against the state of Idaho for payment from the moneys herein appropriated. Such claims shall be made in the manner and form as other claims against the state are made; and, after approval by the commissioner as herein provided for, shall be presented to the state board of examiners for action; and, if allowed by them, as proper claims against the moneys herein appropriated, it shall be the duty of the state controller to draw and deliver to the claimants warrants for such claims against said moneys; and, upon presentation of such warrants to the state treasurer, it shall be his duty to pay such warrants from the said moneys herein appropriated. [1931, ch. 199, § 9, p. 348; I.C.A., § 68-208; am. 1994, ch. 180, § 233, p. 420.]

## STATUTORY NOTES

**Cross References.** — Water rights in general, tit. 42.

**Effective Dates.** — Section 10 of S.L. 1931, ch. 199, declared an emergency.

Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on and after the first Monday of January, 1995, if the state board of canvassers has certified

that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the state auditor to state controller." That amendment was adopted at the election of November 8, 1994, making the amendment by S.L. 1994, ch. 180 effective January 2, 1995.

## CHAPTER 3

## SNAKE RIVER IMPROVEMENTS

## SECTION.

70-301. River improvements on Snake River.

70-302. Commission created — Members — Compensation.

70-303. Termination of commission upon completion of improvements.

70-304. Duties of commissioner of reclamation.

## SECTION.

70-305. Letting work by contract to bidders — Bond.

70-306. Cost of engineering work a charge against funds.

**70-301. River improvements on Snake River.** — River improvements, consisting of levees, jetties, dams, or other preventive measures confining the river in its proper channel, shall be constructed on the Snake River in Jefferson, Madison and Bonneville Counties, Idaho. The character and extent of said improvement and the distance that the same shall extend up and down said river shall be determined by the commission herein provided for. [1935, ch. 89, § 1, p. 168.]

#### STATUTORY NOTES

**Cross References.** — Revenue bonds act, §§ 50-1027 — 50-1042.

#### RESEARCH REFERENCES

**Am. Jur.** — 78 Am. Jur. 2d, Waters, §§ 2, 58. **C.J.S.** — 93 C.J.S., Waters, §§ 10, 18 et seq.

**70-302. Commission created — Members — Compensation.** — There is hereby created a commission which shall have general supervision and control of the construction of said improvements which shall receive the same when completed and certify the completion thereof to the governor of the state of Idaho, and which shall supervise and control the disbursement of the funds provided and appropriated by this act, or so much thereof as may be necessary. Said commission shall consist of the commissioner of reclamation, and three (3) commissioners to be appointed by the governor of the state of Idaho, one (1) of whom shall be a citizen and resident of Jefferson County, one (1) of whom shall be a citizen and resident of Madison County and one (1) of whom shall be a citizen and resident of Bonneville County. For their services as such commissioners, with the exception of the commissioner of reclamation, they shall each receive their actual and necessary expenses, and the sum of five dollars (\$5.00) per day for each and every day's services upon the work or in connection therewith, incurred while actually and necessarily engaged in the discharge of their duties;

Provided, that the three (3) appointive members of said commission shall be chosen immediately upon the passage and approval of this act, and said commission shall forthwith enter upon its duties. [1935, ch. 89, § 2, p. 168.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1935, ch. 89, which is compiled as §§ 70-301 — 70-306.

The reference to the "commissioner of rec-

lamation" in this section would now refer to the "director of the department of water resources." See §§ 42-1801a and 42-1804.

**70-303. Termination of commission upon completion of improvements.** — Upon the completion of the construction of the said improvements and issuance of the certificate of completion thereof to the governor of the state of Idaho, the commission provided for in section 70-302 shall cease to exist. [1935, ch. 89, § 3, p. 168.]

**70-304. Duties of commissioner of reclamation.** — The manner, character and extent of said improvement shall be determined by the commissioner of reclamation. The commissioner of reclamation shall, under the direction of the commission, assume charge of the engineering features of the work and such expense as may be necessary in connection with said engineering work shall be a charge against the funds herein provided. [1935, ch. 89, § 4, p. 168.]

#### STATUTORY NOTES

**Compiler's Notes.** — The reference to the "commissioner of reclamation" in this section would now refer to the "director of the depart-

ment of water resources." See §§ 42-1801a and 42-1804.

**70-305. Letting work by contract to bidders — Bond.** — The commission may, in its discretion, let the work herein provided for, by contract to the lowest and best bidder who shall be required to give a good and sufficient bond for the construction and completion of the said work, or the commission may employ such other means of completing and performing the work herein provided for, as in their judgment may be deemed most expedient and in the public interest. [1935, ch. 89, § 5, p. 168.]

**70-306. Cost of engineering work a charge against funds.** — The cost and charges for engineering work for the said improvements and the expenses of the commission, together with payment of their services as provided for in section 70-302, shall be included as a part of the cost of constructing the said improvement and shall be a charge against the funds herein provided for. [1935, ch. 89, § 6, p. 168.]

#### STATUTORY NOTES

**Effective Dates.** — Section 8 of S.L. 1935, ch. 89 declared an emergency. Approved March 6, 1935.

### CHAPTER 4

#### BOISE RIVER IMPROVEMENTS

##### SECTION.

- 70-401. River improvements on Boise River.
- 70-402. Commission created — Members — Compensation.
- 70-403. Termination of commission upon completion of improvements.
- 70-404. Duties of commissioner of reclamation.

##### SECTION.

- 70-405. Letting work by contract to bidders — Bond.
- 70-406. Cost of engineering work a charge against funds.

**70-401. River improvements on Boise River.** — River improvements, consisting of levees, jetties, dams, or other preventive measures confining the river in its proper channel, shall be constructed on the Boise River in Ada and Canyon Counties, Idaho. The character and extent of said improvement and the distance that the same shall extend up and down said



river shall be determined by the commission herein provided for. [1937, ch. 27, § 1, p. 37.]

#### STATUTORY NOTES

**Cross References.** — Revenue bonds act,  
§§ 50-1027 — 50-1042.

#### **70-402. Commission created — Members — Compensation. —**

There is hereby created a commission which shall have general supervision and control of the construction of said improvements which shall receive the same when completed and certify the completion thereof to the governor of the state of Idaho, and which shall supervise and control the disbursement of the funds provided and appropriated by this act, or so much thereof as may be necessary. Said commission shall consist of the commissioner of reclamation, and two (2) commissioners to be appointed by the governor of the state of Idaho, one (1) of whom shall be a citizen and resident of Ada County, and one (1) of whom shall be a citizen and resident of Canyon County. For their services as such commissioners, with the exception of the commissioner of reclamation, they shall each receive their actual and necessary expenses, and the sum of five dollars (\$5.00) per day for each and every day's services upon the work or in connection therewith, incurred while actually and necessarily engaged in the discharge of their duties.

Provided, that the two (2) appointive members of said commission shall be chosen immediately upon the passage and approval of this act, and said commission shall forthwith enter upon its duties. [1937, ch. 27, § 2, p. 37.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1937, ch. 27, which is compiled as §§ 70-401 — 70-406. lamation" in this section would refer to the "director of the department of water resources." See §§ 42-1801a and 42-1804.

The reference to the "commissioner of rec-

**70-403. Termination of commission upon completion of improvements. —** Upon the completion of the construction of the said improvements and issuance of the certificate of completion thereof to the governor of the state of Idaho, the commission provided for in section 70-402 shall cease to exist. [1937, ch. 27, § 3, p. 37.]

**70-404. Duties of commissioner of reclamation. —** The manner, character and extent of said improvement shall be determined by the commissioner of reclamation. The commissioner of reclamation shall, under the direction of the commission, assume charge of the engineering features of the work and such expense as may be necessary in connection with said engineering work shall be a charge against the funds herein provided. [1937, ch. 27, § 4, p. 37.]

## STATUTORY NOTES

**Compiler's Notes.** — The reference to the “commissioner of reclamation” in this section would now refer to the “director of the department of water resources.” See §§ 42-1801a and 42-1804.

**70-405. Letting work by contract to bidders — Bond.** — The commission may, in its discretion, let the work herein provided for, by contract to the lowest and best bidder who shall be required to give a good and sufficient bond for the construction and completion of the said work, or the commission may employ such other means of completing and performing the work herein provided for, as in their judgment may be deemed most expedient and in the public interest. [1937, ch. 27, § 5, p. 37.]

**70-406. Cost of engineering work a charge against funds.** — The cost and charges for engineering work for the said improvements and the expenses of the commission, together with payment of their services as provided for in section 70-402, shall be included as a part of the cost of constructing the said improvement and shall be a charge against the funds herein provided for. [1937, ch. 27, § 6, p. 37.]

## STATUTORY NOTES

**Effective Dates.** — Section 8 of S.L. 1937, ch. 89 declared an emergency. Approved February 10, 1937.

## CHAPTER 5

## OUTLET CONTROL STRUCTURES

## SECTION.

70-501. Outlet control structure for Priest Lake authorized.

70-502. Construction commenced on approval of plans and specifications.

70-503. Acceptance of contributions — Priest Lake outlet control structure construction fund created.

## SECTION.

70-504. Appropriation to fund.

70-505. Moneys in fund appropriated to purposes of act.

70-506. Exemptions — Reversion of fund.

70-507. Director of the department of water administration to have supervision and control.

**70-501. Outlet control structure for Priest Lake authorized.** — The state reclamation engineer is hereby authorized to prepare plans and specifications for the construction of an outlet control structure to be located in Priest River which will regulate the level of Priest Lake, located in Bonner County, Idaho, at a level which will preserve for the use of the people the beach, boating and other recreational facilities which are now located on said lake. [1950 (E.S.), ch. 61, § 1, p. 87.]

## STATUTORY NOTES

**Cross References.** — Appropriation of waters of Priest Lake in trust for people, §§ 67-4304 — 67-4306.

**Compiler's Notes.** — The reference to

"state reclamation engineer" in this section would refer to the "director of the department of water resources." See § 42-1801a.

**70-502. Construction commenced on approval of plans and specifications.** — Upon approval by the board of examiners of the plans and specifications authorized to be prepared by section 70-501, the state reclamation engineer is hereby authorized and directed to commence construction of such outlet control structure. The provisions of section 67-2304, Idaho Code, as amended, shall have no application to the provisions of this act. [1950 (E.S.), ch. 61, § 2, p. 87.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1950 (E.S.), ch. 61, which is compiled as §§ 70-501 — 70-507.

Section 67-2304 referred to herein was repealed by S.L. 1974, ch. 34, § 1.

The reference to "state reclamation engineer" in this section would refer to the "director of the department of water resources." See § 42-1801a.

**70-503. Acceptance of contributions — Priest Lake outlet control structure construction fund created.** — The board of examiners is hereby authorized to accept contributions from any person, partnership, corporation or association for the purpose of defraying the cost of construction of such outlet control structure. Such contributions, when accepted, shall be deposited in the Priest Lake outlet control structure construction fund, which is hereby created. [1950 (E.S.), ch. 61, § 3, p. 87.]

**70-504. Appropriation to fund.** — There is hereby appropriated to the Priest Lake outlet control structure construction fund out of any moneys in the treasury not otherwise appropriated the sum of three thousand five hundred dollars (\$3,500), or so much thereof as may be necessary. [1950 (E.S.), ch. 61, § 4, p. 87.]

**70-505. Moneys in fund appropriated to purposes of act.** — Any moneys now, or which may hereafter be, in the Priest Lake outlet control structure construction fund are hereby appropriated to the state reclamation engineer for the purposes of this act. [1950 (E.S.), ch. 61, § 5, p. 87.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-502.

The reference to the "state reclamation en-

gineer" in this section would refer to the "director of the department of water resources." See § 42-1801a.

**70-506. Exemptions — Reversion of fund.** — The appropriation herein made is expressly exempt from the provisions of section 67-3509, and chapter 36, title 67, Idaho Code, and shall be immediately available; provided however that upon final completion of construction of said struc-



ture all moneys in the said Priest Lake outlet control structure construction fund shall revert to the general fund. [1950 (E.S.), ch. 61, § 6, p. 87.]

STATUTORY NOTES

**Compiler's Notes.** — Section 67-3509 referred to in this section covers the time when an appropriation shall be available. Chapter

36 of title 67 also referred to is the Standard Appropriations Act of 1945.

**70-507. Director of the department of water administration to have supervision and control.** — The Priest Lake outlet control structure shall, when constructed, be under the supervision and control of the director of the department of water administration, who may enter into contracts for a period of one (1) year or more with persons or corporations, by him deemed qualified, to operate and maintain, at their sole expense, said outlet control structure or any other control structure erected as a replacement thereof: provided, however, that under no circumstances shall the water surface level of Priest Lake be maintained or regulated by said director of the department of water administration above 3.0 feet on the present United States Geological Survey Priest Lake outlet gage with gage datum of 2434.64 feet above mean sea level, datum of 1929, supplementary adjustment of 1947, or released below 0.1 feet on said gage; provided further, that the water surface level of Priest Lake shall be maintained at 3.0 feet on the United States Geological Survey Priest Lake outlet gage, from and after the time each year following the run-off of accumulated winter snows, when the surface level of the waters of Priest Lake has receded to such elevation, until the time after the close of the main recreational season, as determined by said director of the department of water administration, that said lake waters may be released and the surface level permitted to recede below said elevation 3.0. [1950 (E.S.), ch. 61, § 7, p. 87; am. 1957, ch. 128, § 1, p. 216; am. 1961, ch. 177, § 1, p. 271.]

STATUTORY NOTES

**Compiler's Notes.** — The words “director of the department of water administration” in this section would now refer to the “director of the department of water resources”. See § 42-1801a.

**Effective Dates.** — Section 8 of S.L. 1950

(E.S.), ch. 61 declared an emergency. Approved March 7, 1950.

Section 2 of S.L. 1957, ch. 128 declared an emergency. Approved March 4, 1957.

Section 2 of S.L. 1961, ch. 177 declared an emergency. Approved March 11, 1961.

CHAPTERS 6-10

[RESERVED]

CHAPTER 11

PORT DISTRICTS — FORMATION — ANNEXATION — DISINCORPORATION

SECTION.	SECTION.
70-1101. Port districts authorized — Objects and purposes.	70-1103. Petition and election — District of less than entire county.
70-1102. Formation of district — General.	70-1104. Petition — Filing and certification.

## SECTION.

- 70-1105. Petition — Transmission to county commissioners.  
 70-1106. Election — Notice.  
 70-1107. Election — Form of ballot.  
 70-1108. District formation.  
 70-1109. Annexation of land to district — Petitions.  
 70-1110. Annexation — Certification of petition.

## SECTION.

- 70-1111. Annexation — Election.  
 70-1112. Annexation — Canvass and declaration of election results.  
 70-1113. Annexation — Entry of order — Liabilities for outstanding indebtedness.  
 70-1114. Disincorporation.

**70-1101. Port districts authorized — Objects and purposes. —**

Port districts are hereby authorized for the acquirement, construction, maintenance, operation, development and regulation of harbor improvements, land and water transfer and terminal facilities, industrial and economic development, and other development, facilities, and services, reasonably incident to a modern, efficient and competitive port, and may be established under this act in any county bordering upon any continuous waterway system, limited to the port area, which will float commercial tug and barge vehicles to ports handling transoceanic traffic, as in this act provided. [1969, ch. 55, § 1, p. 144; am. 2001, ch. 189, § 1, p. 651.]

**STATUTORY NOTES**

**Cross References.** — Eminent domain, § 7-701 et seq.

Fishing, navigable rivers, sloughs or streams are public highways for angling or fishing, §§ 36-901, 36-907.

Navigation not to be impaired by irrigation district law, § 43-1501.

Pollution of streams, resulting in killing of fish, unlawful, § 36-1101.

Water rights in general, title 42, Idaho Code.

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**Effective Dates.** — Section 4 of S.L. 2001, ch. 189 declared an emergency retroactively to January 1, 2001 and approved March 26, 2001.

**RESEARCH REFERENCES**

**Am. Jur.** — 70 Am. Jur. 2d, Shipping, § 79 et seq.

**C.J.S.** — 80 C.J.S., Shipping, § 11.

**70-1102. Formation of district — General.** — At any election which may be called for that purpose, subject to the provisions of section 34-106, Idaho Code, the board of county commissioners of any county in this state which qualified under section 70-1101, Idaho Code, may, or in petition of ten per cent (10%) of the qualified electors of such county, based on the total vote cast in the county in the last general election, shall by resolution, submit to the voters of such county the proposition of creating a port district with boundaries co-extensive with the boundaries of such county. Such county commissioners may also submit to such vote the proposition of creating a port district with boundaries less than county-wide upon their own resolution, or shall submit the same upon petition as provided in section 70-1103, Idaho Code. No port district shall, at the time of its formation, include lands in more than one (1) county. [1969, ch. 55, § 2, p. 144; am. 1995, ch. 118, § 98, p. 417.]

**70-1103. Petition and election — District of less than entire county.** — Any petition for the formation of a port district may describe a district of less area than the county in which such petition is filed, and in such event the county commissioners shall fix a date for hearing on such petition and publish a notice of such hearing once a week for two (2) successive weeks prior thereto in a newspaper of general circulation within such county. After such hearing, the county commissioners may increase or diminish the boundaries of such proposed port district and shall thereafter submit to vote the proposition of the formation of such port district. The same procedure for notice and election shall be followed as is prescribed for the formation of a port district having boundaries co-extensive with the county boundaries, except that the election shall be confined solely to the lesser port district; and provided, that whenever two (2) or more petitions for the formation of a port district shall be filed as herein provided, the petition describing the greater area shall supersede all others and an election shall first be held thereon, and no port districts shall ever be created within the limits, in whole or in part, of any existing port district.

The boundaries of all port districts shall follow county precinct lines, so that such districts shall include only whole voting districts. [1969, ch. 55, § 3, p. 144.]

#### STATUTORY NOTES

**Cross References.** — Notice by mail,  
§ 60-109A.

**70-1104. Petition — Filing and certification.** — Such petition shall be filed with the clerk of the county within which the district is to be formed, who shall within fifteen (15) days examine the signatures thereon and certify to the sufficiency or insufficiency thereof, and for such purpose the county clerk shall have access to all registration books in the possession of the officials of any municipal corporation in such proposed port district. If such petition be found to be insufficient, it shall be returned to the persons filing the same, who may amend or add names thereto for ten (10) days, when the same shall be returned to the said clerk, who shall have an additional fifteen (15) days to examine the same and attach his certificate thereto. No person having signed such petition shall be allowed to withdraw his name therefrom after the first filing of the same with the said clerk. [1969, ch. 55, § 4, p. 144.]

**70-1105. Petition — Transmission to county commissioners.** — Whenever such petition shall be certified to as sufficient, the county clerk shall forthwith transmit the same, together with his certificate of sufficiency attached thereto, to the board of county commissioners, who shall submit such proposition at the next election to be held pursuant to the provisions of section 34-106, Idaho Code, following the date of such certificate. [1969, ch. 55, § 5, p. 144; am. 1995, ch. 118, § 99, p. 417.]

**70-1106. Election — Notice.** — The board of county commissioners shall direct its clerk to give notice of such election by publishing notice



thereof at least twice, the first of which shall be not less than twelve (12) days prior to the election and the last of which publication shall be not less than five (5) days preceding such election as provided in section 34-1406, Idaho Code. The notice of election shall state the boundaries of the proposed port district and the object of such election. [1969, ch. 55, § 6, p. 144; am. 1995, ch. 118, § 100, p. 417.]

**70-1107. Election — Form of ballot.** — In submitting the said question to the voters for their approval or rejection, the proposition shall be expressed on said ballot substantially in the following terms:

“Port of \_\_\_\_\_ Yes.”

“Port of \_\_\_\_\_ No.”

(Giving the name of the principal river port city within such proposed port district; or, if there be more than one city of the same class within such district, such name as may be determined by the board of county commissioners.) [1969, ch. 55, § 7, p. 144.]

**70-1108. District formation.** — Within five (5) days after such election the board of county commissioners shall canvass the returns; and, if at such election a majority of the voters voting upon such proposition shall vote in favor of the formation of such district, the board of county commissioners shall so declare in its canvass of the returns of such election, and such port district shall thereupon be and become a municipal corporation of the state of Idaho and the name of each port district shall be “Port of \_\_\_\_\_” (inserting the name appearing on the ballot). [1969, ch. 55, § 8, p. 144.]

**70-1109. Annexation of land to district — Petitions.** — The boundaries of any port district may be altered and new territory may be annexed thereto as provided in this act. Such enlarged port district may include land in one or more adjacent counties. Such territory to be annexed must be contiguous to the port district and in one (1) continuous tract, and the exterior lines thereof in all cases must follow precinct boundary lines of such county or counties, so that port districts shall include only whole voting precincts; elections to annex two (2) or more separate tracts of territory shall not be held at the same time. Such annexation may be made only upon the petition of at least ten per cent (10%) of the qualified voters of the area proposed to be annexed based upon the whole number of votes cast within the precincts included within said area proposed to be annexed, at the last preceding general election; such petition shall contain the name of the port district proposed to be enlarged, a description of the exterior boundaries of the territory to be annexed, and shall refer to this section of the act, and all persons signing such petition shall, in addition to signing their name thereon, write thereon their residence address. The petition shall be presented to the county clerk of the county or counties wherein the territory to be annexed lies. [1969, ch. 55, § 9, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — For the words “this act” see Compiler's notes, § 70-1101.

**70-1110. Annexation — Certification of petition.** — If the county clerk or clerks shall find the said petition to be in proper form, and to be signed by the proper number of qualified voters of such areas within their county, they shall so certify to the commissioners of their respective counties, and of the county in which the port district exists. The petition shall be certified at least sixty (60) days before the date of the election herein referred to; the procedure if such petition shall be found insufficient and for the amending thereof, shall be the same as herein provided for petitions for the formation of port districts. [1969, ch. 55, § 10, p. 144.]

**70-1111. Annexation — Election.** — The commissioners of all counties involved, including the existing port district and the area to be annexed, shall submit the proposition to the voters of such area within their respective counties, at the next election held pursuant to section 34-106, Idaho Code. Except as in this section otherwise provided, the procedure for submitting the proposition shall be the same as herein provided for the original formation of a port district. In submitting the question to the voters for their approval or rejection, the proposition shall be expressed on the ballots substantially in the following terms:

“Enlargement of Port of . . . , Yes.” (Giving the name of the port district);

“Enlargement of Port of . . . , No.” (Giving the name of said port district).

The said elections in the counties involved shall be held simultaneously. [1969, ch. 55, § 11, p. 144; am. 1995, ch. 118, § 101, p. 417.]

**70-1112. Annexation — Canvass and declaration of election results.** — At the time provided by law for the canvass of the vote of the election, the board of county commissioners of each county in which either the existing port district, or the area proposed to be annexed, shall lie, shall canvass the returns of the area of its respective county and declare the results of such election in each county. The annexation shall be deemed approved only if a majority of the votes cast in the existing port district were in favor of the proposal and, in addition thereto, a majority of the votes cast in the area proposed to be annexed were in favor of the proposal. [1969, ch. 55, § 12, p. 144.]

**70-1113. Annexation — Entry of order — Liabilities for outstanding indebtedness.** — If a majority of votes cast in the port district and, in addition thereto, a majority of the votes cast in the area to be annexed, favor such annexation, the board of county commissioners in each county in which any such land shall lie, shall enter an order declaring such port district enlarged so as to embrace within the limits thereof the territory described in the petition for such election, and thereupon the boundaries of said port district shall be so enlarged and the port commissioners thereof shall have jurisdiction over the whole of said district as enlarged to the same extent,



and with like power and authority, as though the additional territory had been originally embraced within the boundaries of the existing port district; provided, however, that none of the lands or property embraced within the territory added to and incorporated within such port district shall be liable to assessment for the payment of any outstanding bonds, warrants or other indebtedness of the preexisting port district so enlarged, but such outstanding bonds, warrants or other indebtedness together with interest thereon, shall be paid exclusively from assessments levied and collected on the lands and property embraced within the boundaries of the preexisting port district. [1969, ch. 55, § 13, p. 144.]

**70-1114. Disincorporation.** — (1) A port district may disincorporate after proceedings as required by this section. The port commission shall, upon receiving a petition for disincorporation signed by not less than twenty-five percent (25%) of the number of qualified electors casting votes at the last election of the port commissioners held therein, submit the question of whether such port district shall disincorporate to the electors of the port district. Such election shall be held in accordance with title 34, Idaho Code.

(2) In submitting the said question to the voters for their approval or rejection, the proposition shall be expressed on said ballot substantially in the following terms:

“Disincorporation of Port of . . . Yes.”

“Disincorporation of Port of . . . No.”

(Giving the name of the port district.)

(3) The votes shall be canvassed in the same manner as in other elections. If the canvass of votes shows that less than two-thirds ( $\frac{2}{3}$ ) of the votes cast were in favor of disincorporation, the port commission shall declare the petition for disincorporation denied, in which event no other election shall be held on the question of disincorporating the port district until the expiration of two (2) years from the date of the election so held. If it is found by the canvass of votes that two-thirds ( $\frac{2}{3}$ ) of all the votes cast were in favor of disincorporation, the port commission shall certify such election results to the boards of commissioners of the county or counties in which the port district is located.

(4) The board or boards of commissioners of the county or counties shall thereupon enter an order that the port district be disincorporated, said order to take effect at the end of the calendar year in which the election was held, but in no event less than thirty (30) days from the date of the holding of the election.

(5) All proceedings following entry of the order of disincorporation shall be conducted to the extent practicable in the same manner as is provided for the disincorporation of municipal corporations under sections 50-2206 through 50-2214, Idaho Code; provided that in no event shall disincorporation be effective until all indebtedness of the port district has been paid or duly provided for; and provided further, that no port district may incur new or additional indebtedness after an order for disincorporation has been entered. [I.C. § 70-1114, as added by 2003, ch. 353, § 2, p. 945.]



## CHAPTER 12

## PORT DISTRICTS — ELECTION OF PORT COMMISSIONERS

## SECTION.

- 70-1201. Commissioners — Commissioner districts.
- 70-1202. Commissioners — Qualifications.
- 70-1203. Commissioners — First election.
- 70-1204. Commissioners — Commencement of term.
- 70-1205. Commissioners for annexed area — Original county.
- 70-1206. Commissioners for annexed area of adjacent county.
- 70-1207. Subsequent commissioners — Term of office.
- 70-1208. Commissioners — Elections after formation.
- 70-1209. Formation or annexation between

## SECTION.

- general elections — Election of subsequent commissioners.
- 70-1210. Election procedure — Supplies.
- 70-1211. Elections — Voter qualifications.
- 70-1212. Elections — Nominating petitions.
- 70-1213. Primary elections.
- 70-1214. General elections — Submission of propositions or proposals.
- 70-1215. Additional elections.
- 70-1216. [Repealed.]
- 70-1217. Additional elections — Polling places.
- 70-1218. Additional elections — Registration books.
- 70-1219. Elections — Canvass of vote.
- 70-1220. Elections — Expenses.

**70-1201. Commissioners — Commissioner districts.** — The powers of the port district shall be exercised through a port commission consisting of three (3) members, one (1) from each of the three (3) county commissioner districts of the county in which the port district is located, when the boundaries of the port district are co-extensive with the boundaries of such county. When the port district comprises only a portion of a county, three (3) commissioner districts, numbered consecutively, having approximately equal population and with boundaries following county precinct lines, shall be described in the petition for the formation of the port district, and one (1) commissioner shall be elected from each of said commissioner districts. Any port district may, after formation, be redistricted in the original county of formation as in this act provided. [1969, ch. 55, § 14, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**70-1202. Commissioners — Qualifications.** — No person shall be eligible to hold the office of port commissioner unless he is a qualified elector of the state of Idaho and a resident of the district from which he is seeking office. [1969, ch. 55, § 15, p. 144.]

**70-1203. Commissioners — First election.** — At the same election at which the proposition is submitted to the voters as to whether a port district shall be formed, three (3) commissioners shall be elected to hold office, respectively for the terms of two (2), four (4) and six (6) years. All candidates at the formation election shall be voted upon by the entire port district, and the candidate residing in commissioner district number one (1) receiving the highest number of votes shall hold office for the term of six (6) years; and the candidate residing in commissioner district number two (2) receiving the

highest number of votes shall hold office for the term of four (4) years; and the candidate residing in commissioner district number three (3) receiving the highest number of votes shall hold office for the term of two (2) years. In all subsequent elections in the county of original formation, the port commissioners shall likewise be elected at large within that area of such county embracing the port district. [1969, ch. 55, § 16, p. 144.]

#### STATUTORY NOTES

**Cross References.** — Elections, title 34, Idaho Code.

**70-1204. Commissioners — Commencement of term.** — The terms of all commissioners elected under any section of this chapter shall date from the first day in January following the general election at which they were elected, if elected at a general election, or if elected at other than a general election on the date specified in the certificate of election. [1969, ch. 55, § 17, p. 144; am. 1995, ch. 118, § 102, p. 417.]

**70-1205. Commissioners for annexed area — Original county.** — No additional commissioner shall be elected to represent any annexed area of the county in which the port district was formed, but the port district within such county shall, after each such annexation, be redistricted as in this act provided. [1969, ch. 55, § 18, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For the words "this act" see Compiler's notes, § 70-1201.

**70-1206. Commissioners for annexed area of adjacent county.** — At the same election at which a proposition for annexation of land to an existing district is submitted to vote, if the area to be annexed includes land in a county or counties other than the county in which the original port district exists, one (1) commissioner shall be elected by the voters in such area within the adjacent county or counties to represent such area in case such annexation shall be accomplished as a result of such election. Such commissioner shall hold office for a term of six (6) years and until his successor is elected and qualified. Such commissioner and his successor shall be elected by vote only of the residents of that portion of such county or counties lying within such port district. Such commissioner shall have the same qualifications as herein provided for other commissioners of the district, and shall be a resident of such area. If the annexation shall be accomplished, the port commission shall thereafter consist of the three (3) commissioners of the original port district and the commissioner for such adjacent county or counties. In like manner, in the event of any subsequent annexations, a commissioner having the qualifications herein set forth shall be elected to serve for a six (6) year term as commissioner for such adjacent county or counties, and the port commission shall be expanded to include the commissioner from each such annexed area; provided, that a port

commission shall never exceed five (5) commissioners and no commissioner shall be elected to represent any area annexed to any port commission already having, or being authorized by law to have, five (5) commissioners. [1969, ch. 55, § 19, p. 144.]

**70-1207. Subsequent commissioners — Term of office.** — Commissioners elected subsequent to the formation and/or annexation election shall hold office for a period of six (6) years and until their respective successors are elected and qualified. [1969, ch. 55, § 20, p. 144.]

**70-1208. Commissioners — Elections after formation.** — A general election for election of a port commissioner or commissioners and for the submission to vote of any propositions or proposals shall be held biennially in conjunction with the general county elections in the county of original formation, and at the appropriate times subject to the provisions of section 34-106, Idaho Code, in all annexed counties. [1969, ch. 55, § 21, p. 144; am. 1995, ch. 118, § 103, p. 417.]

**70-1209. Formation or annexation between general elections — Election of subsequent commissioners.** — If any formation or annexation election be held, subject to the provisions of section 34-106, Idaho Code, at any time other than at the time of a general election, then there shall be no election held on the next subsequent general election following the creation of, or annexation to, such port district, as to the commissioners elected at such formation and/or annexation election. [1969, ch. 55, § 22, p. 144; am. 1995, ch. 118, § 104, p. 417.]

**70-1210. Election procedure — Supplies.** — Such general election shall be conducted in the same manner as, and under the laws relating to, the conduct of general county elections including the provisions of chapter 14, title 34, Idaho Code. The port commission may, with the consent of the county commissioners, elect to use, with the county, joint election supplies such as tally books, joint ballots, election stamps and the like or so much thereof as the commission may determine. [1969, ch. 55, § 23, p. 144; am. 1995, ch. 118, § 105, p. 417.]

**70-1211. Elections — Voter qualifications.** — All electors who are, at the time of any port district election, residents of such district and duly qualified to vote within their respective precincts under the general election laws for state and county officers, shall be deemed qualified electors in said port district, but only as to commissioners representing the port area within the county of their residence, and as to propositions to be voted on within such area within their county of residence. [1969, ch. 55, § 24, p. 144.]

**70-1212. Elections — Nominating petitions.** — Nominations for port commissioners at the formation election, at any annexation elections, and for all general elections shall be by petition of not less than five (5) qualified electors of the commissioner district of which the candidate is a resident,



and shall be filed in the office of the county clerk of the county in which such commissioner district is situate, in accordance with the provisions of section 34-1404, Idaho Code.

In any election for commissioner, if after the deadline for filing a declaration of intent as a write-in candidate, it appears that only one (1) qualified candidate has been nominated for a commissioner position, it shall not be necessary for the candidate to stand for election, and the port commission shall declare such candidate elected as a commissioner, and the secretary of the commission shall immediately make and deliver to such person a certificate of election. [1969, ch. 55, § 25, p. 144; am. 1995, ch. 118, § 106, p. 417.]

**70-1213. Primary elections.** — In the event valid nominating petitions for more than two (2) candidates remain on file for the office of port district commissioner in any commissioner district after the last day for withdrawal of candidacy, the county clerk shall conduct a port district primary at the same time he conducts the county primary election. At all such nominating elections, the nomination of candidates shall be nonpartisan, and the ballot, or portion of ballot, to be used for such nominating election shall be designated "Port District Nominating Ballot, Port of \_\_\_\_\_" (inserting the name of the appropriate port district), and such ballot shall not have upon it any political party designation nor statement of any affiliation whatever of any candidate named thereon. In the event no more than two (2) such nominating petitions remain on file for the office of port district commissioner in any port commissioner district after the last day for withdrawal of candidacy, the county clerk shall not conduct such port district primary, but shall cause the name of such candidates to be printed upon the port district ballot for the general election only. Such general election ballot, or portion of the ballot for use in such port election, shall be designated "Official Ballot, Port of \_\_\_\_\_" (inserting therein the name of such port district), and shall contain no political party designation nor statement of any affiliation whatsoever of any candidate named thereon.

In the event a primary election is conducted for the office of port district commissioner, the name of the person who receives the greatest number of votes and of the person who receives the second greatest number of votes for each commissioner district, shall appear upon the port district general election ballot under the designation for each respective office. Names of candidates printed on the district primary and general election ballots shall be rotated, as nearly as may be, in the same manner as are names of candidates under the election laws of this state relating to the election of county officers.

Any port commissioner may be recalled in accordance with the statutory provisions for the recall of county officers then in effect; provided, however, that only voters residing within and qualified to vote within the port district may vote at any such recall election. [1969, ch. 55, § 26, p. 144.]

**70-1214. General elections — Submission of propositions or proposals.** — In the event the port commissioners shall determine to submit

any propositions or proposals to the voters at any such general election, the president and secretary of such port district, shall, within sixty (60) days prior to said general election, certify to the county clerk of each county in which said port district exists, or in which such proposition or proposal is to be submitted, a statement of the propositions or proposals to be submitted, in the form the same are to be placed upon the port district ballot, and the county clerk shall cause to be placed upon the port district ballot, following the names of the candidates to be voted upon at such election, the statement of the propositions or proposals to be voted upon together with appropriate spaces for voting for or against such propositions or proposals. [1969, ch. 55, § 27, p. 144.]

**70-1215. Additional elections.** — Additional elections within any port district may be held at such times and for the submission of such propositions or proposals as the port commission may by resolution prescribe, subject to the limitations provided in section 34-106, Idaho Code. Such elections shall be conducted in accordance with the general election laws of the state, including chapter 14, title 34, Idaho Code. [1969, ch. 55, § 28, p. 144; am. 1995, ch. 118, § 107, p. 417.]

**70-1216. Special elections — Notice. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised 1969, ch. 55, § 29, p. 144, was repealed by S.L. 1995, ch. 118, § 112, effective July 1, 1995.

**70-1217. Additional elections — Polling places.** — For such additional elections, there shall be not less than one (1) polling place within each port commissioner district. It shall be the duty of the port commissioners at least twenty (20) days before all special elections, to designate by resolution the polling places for such special election, and to appoint three (3) election officials for each polling place. [1969, ch. 55, § 30, p. 144; am. 1995, ch. 118, § 108, p. 417.]

**70-1218. Additional elections — Registration books.** — As provided in section 34-1402, Idaho Code, the county clerk of any county in which a port district is located shall maintain the register of electors and make such register available to the election officials of the port district. [1969, ch. 55, § 31, p. 144; am. 1995, ch. 118, § 109, p. 417.]

**70-1219. Elections — Canvass of vote.** — The returns of all port district elections, except formation and annexation elections, shall be canvassed by the port commission, which shall meet within fifteen (15) days following such selection [election] and proceed to canvass the same, and shall thereupon declare the results. [1969, ch. 55, § 32, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "election" was inserted by the compiler.

**70-1220. Elections — Expenses.** — All expenses of elections for the formation of a port district and annexations thereto shall be paid by the county or counties holding such election, and such expenditure is hereby declared to be for a county purpose. The port district shall bear the expenses, or the proportional share of the expense, if held in conjunction with other elections, of all other port district elections. [1969, ch. 55, § 33, p. 144.]

## CHAPTER 13

## PORT DISTRICTS — REVISION OF COMMISSIONER DISTRICTS

## SECTION.

70-1301. Revision of commissioner districts authorized.

70-1302. Meeting for revision public — Notice.

## SECTION.

70-1303. Change not to affect existing terms of office.

**70-1301. Revision of commissioner districts authorized.** — The commission by resolution may, and upon petition signed by not less than two hundred fifty (250) electors residing in the area to be redistricted, shall, re-establish the boundaries of the commissioner districts in that portion of the port district which he is in the county in which the district was initially formed, so that each such commissioner district shall comprise as nearly as possible one-third ( $\frac{1}{3}$ ) of the population of so much of the port district as is within such county, provided that no county voting precinct shall be divided by the boundary lines of a commissioner district. [1969, ch. 55, § 34, p. 144.]

**70-1302. Meeting for revision public — Notice.** — The revision of boundary lines provided for in this act shall be made only at a meeting of the port commission with attendance of all of the members of the commission, which meeting shall be public. The port commission shall give notice of such meeting by publishing the same in a daily newspaper of general circulation within the port district, or if there be no such daily newspaper, then in a weekly newspaper of general circulation within such port district. Such notice shall be published not less than once per week for two (2) consecutive weeks, the date of the first publication to be not more than twenty (20) days prior to the date fixed for such meeting. Such notice shall state the time, place and purpose of the meeting. [1969, ch. 55, § 35, p. 144.]

## STATUTORY NOTES

**Cross References.** — Notice by mail, refer to S.L. 1969, ch. 55, compiled as chapters 60-109A. 11-20 of this title.

**Compiler's Notes.** — The words "this act"



**70-1303. Change not to affect existing terms of office.** — Any change of boundary lines provided for in this act shall not affect the terms of commissioners already in office at the time the change is made. [1969, ch. 55, § 36, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1302.

### CHAPTER 14

#### PORT DISTRICTS — COMMISSIONS IN GENERAL

##### SECTION.

70-1401. Commission — Organization.

70-1402. Record of proceedings.

70-1403. Quorum.

70-1404. Per diem — Reimbursement for expenses.

70-1405. Mileage.

##### SECTION.

70-1406. Vacancy — How caused.

70-1407. Vacancies — How filled.

70-1408. Employees.

70-1409. Fidelity bonds.

70-1410. Interest in contracts prohibited — Exceptions.

**70-1401. Commission — Organization.** — Each port commission shall organize by the election from its own members of a president, vice-president, secretary and treasurer. The office of secretary and treasurer may be combined in one (1) commissioner. The commissioners elected at the formation election shall adopt an official seal. Each commission may, by resolution, adopt rules governing the transaction of its business, which rules shall continue in force and effect until altered, changed, amended or voided by the subsequent action of the commission adopting the same, or any subsequent commission. [1969, ch. 55, § 37, p. 144.]

**70-1402. Record of proceedings.** — The proceedings of the meetings of the port commission shall be by motion or resolution recorded in the minutes of such meeting, which shall be kept in a minute book and shall be a public record. [1969, ch. 55, § 38, p. 144.]

**70-1403. Quorum.** — A majority of the persons holding the office of port commissioner at any time shall constitute a quorum of the port commission for the transaction of business, and the concurrence of a majority of the persons holding such office at the time shall be necessary and shall be sufficient for the transaction of any port business, but no business shall be transacted unless there are in office at least a majority of the full number of commissioners fixed by law. [1969, ch. 55, § 39, p. 144.]

**70-1404. Per diem — Reimbursement for expenses.** — There shall be paid to each of the port commissioners from the funds of the district, not more than fifty dollars (\$50.00) per day for each day spent attending meetings, or while engaged in port business authorized by the port commission. In addition, such commissioners and the agents and employees of the district shall be entitled to be reimbursed upon order of the commission,

from funds of the district, for all reasonable sums expended by them in furthering the business of the port. [1969, ch. 55, § 40, p. 144; am. 1984, ch. 128, § 1, p. 303.]

**70-1405. Mileage.** — Commissioners, agents and employees of port districts, while using their personal vehicles for travel for port purposes, as authorized by the commission, shall be entitled to receive from port funds, mileage reimbursement at a rate per mile to be fixed from time to time by the port commission, but not exceeding the maximum rate allowed to state officials by other agencies of the state of Idaho. Such reimbursement for mileage shall include the mileage of commissioners, agents and employees in traveling to and from their place of residence for attendance at meetings and for all other authorized port purposes. [1969, ch. 55, § 41, p. 144.]

**70-1406. Vacancy — How caused.** — A vacancy in the office of port commissioner shall occur by death, resignation, removal from office, conviction of a felony, non-attendance at meetings of the port commission for a period of sixty (60) days unless excused by the port commission, by any statutory disqualification, by the removal of any commissioner of his residence from the port district, or by any permanent disability preventing the proper discharge of his duty. [1969, ch. 55, § 42, p. 144.]

**70-1407. Vacancies — How filled.** — In the event of any vacancy in the office of port commissioner, such vacancy shall be filled at the next general election, and in the interim the vacancy shall be filled by appointment by a majority vote of the remaining port commissioners, and if said port commissioners shall fail to make such appointment within thirty (30) days after such vacancy occurs, then such appointment shall be made by the county commissioners of the county in which the vacant commissioner district exists.

If there should be at the same time, such number of vacancies that there are not in office a majority of the full number of commissioners fixed by law, the county commissioners of the county of each district in which such vacancy exists shall within thirty (30) days of such vacancy make appointments to fill the vacancies ad interim through the next general election. [1969, ch. 55, § 43, p. 144.]

**70-1408. Employees.** — The port commission shall have authority to retain legal counsel, and other professional and technically trained persons, on general or special retainer, and to create and fill positions, to fix wages and salaries thereof, to pay costs and assessments involved in securing or arranging to secure employees, and to establish such benefits for employees, including holiday pay, vacations or vacation pay, retirement and pension benefits, medical, surgical or hospital care, life, accident, or health disability insurance, and similar benefits, as commonly established by other employers of similar employees, as the port commission shall provide. The port commission shall have authority to provide or pay such benefits directly, or to provide for such benefits by the purchase of insurance policies or by



entering into contracts with and compensating a person, firm, agency or organization furnishing such benefits, or by making contributions to vacation plans or funds, or health and welfare plans and funds, or pension plans or funds, or similar plans or funds, as commonly established by other employers of similar employees and in which the port district is permitted to participate for particular classifications of its employees by the trustee or other persons responsible for the administration of such established plans or funds. The port commission shall have the authority to utilize and compensate agents for the purpose of paying, in the name and by the check of such agent or agents or otherwise, wages, salaries and other benefits to employees, or particular classifications thereof, and for the purpose of withholding payroll taxes and paying over tax moneys so withheld to appropriate governmental agencies, on a combined basis with the wages, salaries, benefits, or taxes of other employers or otherwise; to enter into such contracts and arrangements with and to transfer by check such funds from time to time to any such agent or agents so appointed as are necessary to accomplish such salary, wage, benefit, or tax payments as though the port district were a private employer, notwithstanding any other provision of the law to the contrary. The funds of a port district transferred to such an agent or agents for the payment of wages or salaries of its employees in the name or by the check of such agent or agents shall be subject to garnishments with respect to salaries or wages so paid, notwithstanding any provision of the law relating to municipal corporations to the contrary. [1969, ch. 55, § 44, p. 144.]

**70-1409. Fidelity bonds.** — The port auditor, the port treasurer and the port manager shall execute and file with the commission fidelity bonds, with a surety company lawfully doing business within the state of Idaho, satisfactory to the commission, in such amount as the commission shall from time to time determine, which amount shall not be less than five thousand dollars (\$5,000) as to each such person, which bonds shall be conditioned for the faithful performance by such persons of their official duties as such port officials.

The commission in like manner may require a bond of such other of its officers, agents and employees, as it shall determine, in such amount and upon such conditions as it shall from time to time determine. [1969, ch. 55, § 45, p. 144.]

**70-1410. Interest in contracts prohibited — Exceptions.** — No port commissioner or employee shall be beneficially interested, directly or indirectly, in any contract which may be made by, through or under the supervision of such commission or employee, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or award in connection with such contract from any person beneficially interested therein.

This section shall not apply in the following cases:

(1) The furnishing of electrical, water or other utility services by a municipality or private corporation engaged in the business of furnishing



such services at the same rates and on the same terms as are available to the public generally;

(2) The designation of public depositories for municipal funds;

(3) The publication of legal notices required by law to be published by the port commission, upon competitive bidding or at rates not higher than are charged members of the general public;

(4) Any contract in such port district in which the total volume of business represented by such contract or contracts in which a particular commissioner or employee is interested, in the aggregate, as measured by the dollar amount of port's liability thereunder, shall not exceed two hundred dollars (\$200) in any calendar month;

(5) Ownership of any interest in, or any participation in any cooperative warehouse or facility within the port district, for the cooperative storage and/or marketing of farm or other goods or products, provided, that, such exclusion shall not extend to officers, elected officials or paid employees of any such cooperative warehouse or facility;

(6) Any such contract, where the same shall have been approved by order of the judge of the district court of the county in which is located the city for which the district is named, upon the petition of the port commission, or of any party interested in such contract. Notice of hearing on such petition shall be given for such time and in such manner as such court by order directs. [1969, ch. 55, § 46, p. 144.]

## CHAPTER 15

### PORT DISTRICTS — POWERS

#### SECTION.

- 70-1501. Acquisition of property and facilities — Operation.
- 70-1502. Acquisition of property — Eminent domain — Levy of assessments.
- 70-1503. Ownership and operation of property in general.
- 70-1504. Navigation — Waterway improvement.
- 70-1505. Rates and charges.
- 70-1506. Foreign trade zones.
- 70-1507. Industrial development — Improvements.

#### SECTION.

- 70-1508. Joint exercise of powers — Joint acquisition of property — Contracts with other governmental entities.
- 70-1509. Cooperation with United States — Federal aid — Sale of bonds — Powers conferred.
- 70-1510. Federal aid — Preliminary studies.
- 70-1511. United States surplus property — Acquisition.
- 70-1512. Federal aid powers supplemental — Construction.

**70-1501. Acquisition of property and facilities — Operation.** — A port district may finance, construct, condemn, purchase, acquire, add to, equip, maintain and operate any and all facilities and services reasonably incident to the operation of a modern, efficient and competitive port, together with industrial and economic development facilities of any kind or nature which maintain or increase employment opportunities in a port district. In connection with its operations, a port district may perform all customary services including, but not limited to, the handling, weighing, measuring, reconditioning and storage for hire, processing and/or holding for transshipment of all commodities. [1969, ch. 55, § 47, p. 144; am. 1994, ch. 114, § 1, p. 261; am. 2001, ch. 189, § 2, p. 651.]

## STATUTORY NOTES

**Effective Dates.** — Section 4 of S.L. 2001, ch. 189 declared an emergency retroactively to January 1, 2001 and approved March 26, 2001.

**70-1502. Acquisition of property — Eminent domain — Levy of assessments.** — A port district may acquire by purchase, for cash or on deferred payments for a period not exceeding ten (10) years, or by condemnation, or by both, all lands, property, property rights, leases or easements necessary for its purposes and may exercise the right of eminent domain in the acquirement or damaging of all such lands, property, and property rights, and may levy and collect assessments upon property for the payment of all damages and compensations in carrying out its purposes. Except as modified or enlarged in this act, the provisions of chapter 7 of title 7, Idaho Code, shall apply to condemnation of estates, interests or rights in lands by port districts. [1969, ch. 55, § 48, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

## RESEARCH REFERENCES

**A.L.R.** — Right to condemn property in excess of needs for a particular public purpose. 6 A.L.R.3d 297.  
and subdivision or agency thereof, or as between different subdivisions or agencies themselves. 35 A.L.R.3d 1293.  
Power of eminent domain as between state

**70-1503. Ownership and operation of property in general.** — A port district may own and control lands, leases, and all easements and interests in land and all manner of personal property for all lawful port purposes and operate any and all property or facilities in any way acquired or owned by such port district, either within or without the boundaries of said district. [1969, ch. 55, § 49, p. 144.]

**70-1504. Navigation — Waterway improvement.** — Port districts shall have full power and authority to regulate and control all navigable and non-navigable waters of the United States and of the state of Idaho, so far and to the full extent that this state can grant the same, within and adjacent to the boundaries thereof, when necessary to the efficient development and operation of the port district; and to that end may straighten, widen, deepen, and otherwise improve any and all such waterways, waters, water courses, bays, lakes, streams or other waters, whether navigable or otherwise, and may create or improve new waterways. [1969, ch. 55, § 50, p. 144.]

**70-1505. Rates and charges.** — A district may fix, without right of appeal therefrom, the rate of wharfage, dockage, warehousing, and all necessary port and terminal charges upon all improvements owned and/or operated by it, and the charges of ferries operated by it. The port commission



shall file with the public utilities commission of this state, its schedule of rates and charges so fixed. It may change any rate or charge so filed, by filing with the commission a notice of the proposed change not less than thirty (30) days before the change shall go into effect.

It may fix, subject to state regulation, all such charges upon all docks, wharves, warehouses, quays and piers owned by the state of Idaho, and operated under lease therefrom, and/or by agreement therewith. [1969, ch. 55, § 51, p. 144.]

**70-1506. Foreign trade zones.** — A port district may apply to the proper authority of the United States under any law now or hereafter in force for the right to establish, operate and maintain foreign trade zones within the limits of the port district and may establish, operate and maintain such foreign trade zones. [1969, ch. 55, § 52, p. 144.]

**70-1507. Industrial development — Improvements.** — A port district may improve its lands by dredging, filling, bulk-heading, providing waterways, or otherwise developing such lands for sale or lease for industrial and commercial purposes. Such district may cooperate with the U.S. Army Corps of Engineers, or any other applicable governmental agencies or instrumentalities in the management and development of lands acquired by the port and/or acquired by such governmental agencies and/or acquired by the port and such governmental agencies jointly. [1969, ch. 55, § 53, p. 144.]

**70-1508. Joint exercise of powers — Joint acquisition of property — Contracts with other governmental entities.** — Any two (2) or more port districts shall have the power, by mutual agreement, to exercise jointly all powers granted to each individual district, and in the exercise of such powers shall have the right and power to acquire jointly all lands, property, property rights, leases, or easements necessary for their purposes, either entirely within, or partly within and partly without, or entirely without such districts; provided that any two (2) or more districts so acting jointly, by mutual agreement, shall not acquire any real property or real property rights in any other port district without the consent of such district. A port district may enter into any contract with the United States, or any state, county or municipal corporation, or any agency or instrumentality thereof, for carrying out any powers which each of the contracting parties may by law exercise separately. [1969, ch. 55, § 54, p. 144.]

**70-1509. Cooperation with United States — Federal aid — Sale of bonds — Powers conferred.** — Every port district shall have power and is hereby authorized to completely and fully cooperate with the United States in all its programs and under all its laws, and to accept and use all available federal aid, and by way of illustration and not of limitation to do any or all of the following:

(1) Accept from the United States or any agency or instrumentality thereof, loans or grants for or in aid of any port development;

(2) Make contracts and execute instruments containing such terms, provisions, and conditions as in the discretion of the port commission may be



necessary, proper or advisable for the purpose of obtaining grants or loans, or both, from any such federal agency or instrumentality, under any law of the United States, or the rules or regulations promulgated thereunder; to make all other contracts and to execute all other instruments necessary, proper or advisable in or for the furtherance of any port improvement and to carry out and perform the terms and conditions of all such contracts or instruments;

(3) Subscribe to and comply with the provisions of all the laws of the United States and any rules and regulations made by any such federal agency or instrumentality, with regard to any such grants or loans or both;

(4) Perform any acts authorized under this act through or by means of its own officers, agents and employees, or by contract with corporations, firms, or individuals;

(5) Any contract to be let involving funds secured or to be secured in whole or in part under any such United States laws, rule or regulation, or any part thereof, may be awarded upon any day at least fifteen (15) days after one (1) publication of a notice requesting bids upon such contract in a newspaper of general circulation in the port district; provided, that in any case where publication of notice may be made for a shorter period of time under the provisions of existing statute or charter, such statute or charter shall govern;

(6) To sell bonds at private sale to any agency or instrumentality of the United States or of this state, or to any sister state, or to any municipal corporation of this or any sister state, without any public advertisement;

(7) To issue interim receipts, certificates, warrants, or other temporary obligations, in such form and containing such terms, conditions and provisions as the port commission issuing the same may determine, pending the preparation or execution of bonds for the purpose of financing such projects;

(8) To issue bonds bearing the signatures of officers in office of the date of signing such bonds, notwithstanding that before delivery thereof any or all the persons whose signatures appear thereon shall have ceased to be the officers of the port commission issuing the same;

(9) To include in the cost of any such project which may be financed by the issuance of bonds: (a) engineering, inspection, accounting, fiscal and legal expenses; (b) the cost of issuance of the bonds, including engraving, printing, advertising, and other similar expenses; (c) any interest costs during the period of construction on such project and for six (6) months thereafter on money borrowed or estimated to be borrowed;

(10) To stipulate in any contract for the construction of any such project or part thereof, the maximum hours that any laborer, workman or mechanic shall be permitted or required to work in any one (1) calendar day or calendar week or calendar month, and the minimum wages to be paid to laborers, workmen or mechanics in connection with any such project; provided, that no such stipulation shall provide for hours in excess of, or for wages less than may now or hereafter be required by any other law;

(11) To exercise any power conferred by this act independently or in conjunction with any power or powers conferred by any other law. [1969, ch. 55, § 55, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1502.

**70-1510. Federal aid — Preliminary studies.** — Port districts are hereby authorized to accept from the United States government all loans, advances, grants in aid, or donations which may be made available under any federal act, rule or regulation, for the purpose of financing the cost of architectural, engineering, or economic investigations or of studies, surveys, designs, plans, working drawings, specifications, procedures, and other matters preliminary to the construction of public works. [1969, ch. 55, § 56, p. 144.]

**70-1511. United States surplus property — Acquisition.** — Port districts may acquire, by gift or for consideration, individually or with other port districts or municipal corporations or instrumentalities of this state, surplus United States property, and/or other property of the United States or any other public body made available for such acquisition, and may hold and use the same for all lawful port purposes, subject to applicable federal laws and regulations appertaining thereto. Such property may be so acquired and used whenever the port commission finds the acquisition and/or use thereof to be to the present or future benefit of the port district, and whether or not the acquisition and/or use thereof is contemplated within the port district's comprehensive plan of harbor improvement and port development. [1969, ch. 55, § 57, p. 144.]

**70-1512. Federal aid powers supplemental — Construction.** — The powers conferred by sections 70-1509 — 70-1512 shall be in addition and supplemental to, and not in diminution of or substitution for any powers now or hereafter conferred upon any port district by this act or any other law. The provisions of such sections are intended to simplify the procedure for the construction and financing of port improvements, and are remedial in nature and the powers thereby granted shall be liberally construed; provided, that such section shall not be construed to authorize the issuance of general obligation bonds by such port, in excess of the limitations contained in this act and any such bonds shall be issued only upon compliance with the provisions of this act concerning the issuance of general obligation bonds. [1969, ch. 55, § 58, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1502.

## CHAPTER 16

PORT DISTRICTS — FURTHER POWERS AND PROCEDURES — HARBOR  
IMPROVEMENT PLANS

## SECTION.

- 70-1601. Adoption of harbor improvement and port development plan.
- 70-1602. Improvements to follow plan adopted.
- 70-1603. Amendment, modification of change of plan.
- 70-1604. Plans heretofore adopted — Saving clause.
- 70-1605. Ownership of improvements.
- 70-1606. Engineering studies, investigations, and surveys — Promotion of port — Rules and regulations for expenditures — Vouchers.
- 70-1607. Regulations for use of port properties and facilities — Adoption, amendment, and repeal — Violations may be misdemeanors.
- 70-1608. Jurisdiction of other public bodies.
- 70-1609. Counties — Tax-title lands.

## SECTION.

- 70-1610. Sale of property no longer needed.
- 70-1611. Exchange of property.
- 70-1612. Purchasing procedures — Contracts.
- 70-1613. Notice — Award of contract — Bond.
- 70-1614. Leases and contracts without notice or bond.
- 70-1615. Gifts — Improvement and use.
- 70-1616. Lease of property — Performance bond or other financial guaranty.
- 70-1617. State-owned lands within port area — Development — Lease.
- 70-1618. State-owned lands — Acquisition by port districts.
- 70-1619. Lease of property — Payment in lieu of taxes.
- 70-1620. By-product and waste material disposition.

**70-1601. Adoption of harbor improvement and port development plan.** — It shall be the duty of the port commission of any port district, before creating any improvements hereunder, to adopt a comprehensive plan of harbor improvement and port development for such port district after a public hearing thereon, notice of which shall be given by publication in a daily newspaper of general circulation in such port district by one (1) publication at least ten (10) days prior to the date of hearing, and no expenditure for the carrying on of any harbor improvement or port development shall be made by said commission other than necessary salaries, including engineers, clerical and office expenses of such port district, and the cost of engineering, surveying, preparation and collection of data necessary for the making and adoption of a general plan of harbor improvement and port development for such port district, unless and until such comprehensive plan of harbor improvement and port development has been so officially adopted by the port commission.

Recognizing that it will be necessary that port districts engage in long range planning, and that it will normally be necessary to alter such plan from time to time, such plan need only be in general terms. [1969, ch. 55, § 59, p. 144.]

**70-1602. Improvements to follow plan adopted.** — When such general plan shall have been adopted as provided in section 70-1601, improvements to be made by the commission shall be made substantially in accordance therewith unless and until such general plan shall have been officially amended, modified or changed by the port commission. [1969, ch. 55, § 60, p. 144.]



**70-1603. Amendment, modification of change of plan.** — The plan may be amended, modified or changed by the port commission at any time after a public hearing thereon, notice of which shall be published in a newspaper of general circulation in such port district by one (1) publication at least ten (10) days prior to the date of the hearing, and such plan as amended, modified or changed shall be and remain the district's plan of harbor improvement and port development, until the same shall again be amended, modified or changed by the port commission in the same manner. [1969, ch. 55, § 61, p. 144.]

**70-1604. Plans heretofore adopted — Saving clause.** — All plans adopted by any port commission prior to the effective date of this act [February 25, 1969] are validated and shall be and continue in full force and effect, as though lawfully adopted under the provisions of this act. [1969, ch. 55, § 62, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**70-1605. Ownership of improvements.** — Except as to lands acquired or improved for industrial development, no improvements shall be acquired or constructed by the port district, unless such improvements shall, when completed, be the property of such port district, or the county in which such improvement is located, the state of Idaho, the United States of America or a sister state of the United States of America or some municipal or public corporation or political subdivision thereof, or shall be jointly owned by any two (2) or more thereof. The funds of such port district may be expended in the acquirement or construction of any harbor or port improvement embraced in such plan adopted as in this act provided, in conjunction with any such entity. In amplification and not in limitation of the foregoing, port districts may, in the exercise of all lawful port district powers, and for all lawful port district purposes, contract with, enter into joint leases and contracts of all types, enter into compacts, joint venture, incur indebtedness jointly, and in all lawful manner deal with other port districts and/or municipal corporations and/or political subdivisions of this state and/or of sister states, and/or of the United States of America. The power hereby granted shall include, but not be limited to the power to jointly own and operate port properties and/or facilities in one or more port districts, whether within or without the state of Idaho. [1969, ch. 55, § 63, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1604.

**70-1606. Engineering studies, investigations, and surveys — Promotion of port — Rules and regulations for expenditures — Vouch-**

**ers.** — All port districts are authorized and empowered, either alone or jointly with the state of Idaho, sister states, the United States of America, or any municipal or public corporation or political subdivision thereof or with other operators of terminal or transportation facilities, to initiate and carry on the necessary engineering studies, investigations and surveys required for the proper development, improvement and utilization of all port properties, utilities and facilities, and to assemble and analyze the data thus obtained, and to make such expenditures as are necessary for such purpose, and for the proper promotion, advertising, improvement and development of the port. Port district expenditures for industrial development, port promotion, or promotional hosting shall be pursuant to specific and separate budget items as approved by the port commission as a part of its annual budget, as the same may be amended or supplemented under the provisions of this act. The port commission shall adopt written rules and regulations governing the expenditure of port funds for promotional purposes and/or port hosting by port employees and agents. Such rules and regulations shall identify the employees and agents authorized to make such expenditures and shall state the objectives of such expenditures. Port commissioners shall not seek reimbursement for any such expenditures personally made by any such commissioner, unless specific authorization for such expenditure was approved by the port commission in advance of such expenditure. Reimbursement for all such expenditures shall be upon port voucher properly identified and approved by the port commission and audited in the same manner as are other port vouchers. [1969, ch. 55, § 64, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1604.

#### RESEARCH REFERENCES

**A.L.R.** — Right to enter land for preliminary survey or examination. 29 A.L.R.3d 1104.

**70-1607. Regulations for use of port properties and facilities — Adoption, amendment, and repeal — Violations may be misdemeanors.** — A port district may formulate all needful regulations for the use by tenants, agents, servants, licensees, invitees, suppliers, passengers, customers, shippers, business visitors and members of the general public, of any properties or facilities owned or operated by it, and request the adoption, amendment or repeal of such regulations as part of the ordinances of the city in which such properties or facilities are situated, or as a part of the resolutions of the county, if such properties or facilities be situated outside any city. The port commission shall make such request by resolution after holding a public hearing on the proposed regulations, notice of which shall be published in a legal newspaper of general circulation in the port district by one (1) publication at least ten (10) days prior to such hearing. In such notice the proposed regulation may be stated in general terms. Such

regulations must conform to and be consistent with federal and state law. As to properties or facilities situated within a city, such regulations must conform to and be consistent with the ordinances of the city. As to properties or facilities situated outside any city, such regulations must conform to and be consistent with county ordinances or resolutions. Upon receiving such request, the governing body of the city or county as the case may be, may adopt such regulations as part of its ordinances or resolutions or amend or repeal such regulations in accordance with the terms of the request. Such regulations may be amended or repealed in the same manner as they are adopted. Such regulations shall be compiled and shall be a matter of public record. When any such regulation shall so specify, any violation thereof shall constitute a misdemeanor which shall be redressed in the same manner as other municipal police regulations, and it shall be the duty of all law enforcement officers to enforce such regulations accordingly. [1969, ch. 55, § 65, p. 144.]

**70-1608. Jurisdiction of other public bodies.** — No municipal corporation, political subdivision or other public body or agency of this state shall have jurisdiction over port operations, port facilities, port-owned property, port services or other matters under port district regulation or operation. Notwithstanding the above provisions, the general police regulations, building codes, fire codes, health and sanitation regulations, fuel storage regulations, including the inspection and control provisions thereof, and any and all other such regulatory codes that are in force within the limits of any city or county shall, except where the subject matter is subject to state or federal regulations, be applicable to such operations, facilities, property, services or other matters under port district regulation or operation when any such are situated or conducted within the limits of any city or county. [1969, ch. 55, § 66, p. 144.]

**70-1609. Counties — Tax-title lands.** — Any county acquiring title to any lands within the area encompassed by any port district plan of harbor improvement or port development, and/or in any industrial development district created under this act, after the period of redemption thereof shall have expired, may, in lieu of public auction thereof, upon the request of the port commission, either grant such lands to the port district without remuneration or sell the lands to the port district for the amount of such delinquent taxes, together with any penalties and interest to which the county is entitled under the taxation laws of this state, as the county commissioners shall determine. Nothing in this section shall prevent such county commissioners from granting or selling such lands to any other municipality or public body that may make application therefor. [1969, ch. 55, § 67, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1604.



**70-1610. Sale of property no longer needed.** — A port district may sell and convey any of its property when the port commission has declared the property to be no longer needed for district purposes, but no real property which is a part of a comprehensive plan of harbor improvement of port development, or modification thereof, shall be disposed of without a public hearing upon the question of such disposition, after notice given in the same manner and for the same time as is notice for the adoption of the comprehensive plan. [1969, ch. 55, § 68, p. 144.]

**70-1611. Exchange of property.** — The port commission may exchange any property owned by the port district, for other property of equivalent value and/or may make such exchange of property and pay or receive any difference in value in cash or upon such terms as the port commission shall approve, and in determining such values may appoint an appraiser or appraisers to appraise such properties involved in any such transaction. [1969, ch. 55, § 69, p. 144.]

**70-1612. Purchasing procedures — Contracts.** — (1) Except as otherwise provided in this section and in section 70-1613, Idaho Code, procurement by port districts shall comply with the provisions of chapter 28, title 67, Idaho Code. In addition to the standards established thereby, a port district may also call for bids on work or material based upon plans and specifications submitted by the bidder.

(2) Should emergency repairs to, or replacements of any equipment or other property owned or operated by any port district, become necessary in order to keep the port from ceasing operations, the port commission may, upon passing a resolution declaring such emergency, cause such repairs or replacements to be made without the necessity of compliance with subsection (1) of this section.

(3) The provisions of subsection (1) of this section shall not apply to the purchase or acquisition of used personal property. [1969, ch. 55, § 70, p. 144; am. 1980, ch. 211, § 1, p. 480; am. 1986, ch. 118, § 1, p. 312; am. 1987, ch. 83, § 1, p. 157; am. 2005, ch. 213, § 41, p. 637.]

#### STATUTORY NOTES

**Cross References.** — Splitting or separating purchases or work projects to evade competitive bidding, § 59-1026.

**70-1613. Notice — Award of contract — Bond.** — Upon following the procedural steps established by chapter 28, title 67, Idaho Code, for receipt of bids, as modified by provisions of this title, the port commission shall proceed to canvass the bids, and at the proper time thereafter may let the contract upon the bid which the commission determines to be the best responsible bid, whether or not the same be the lowest bid, upon the plans and specifications on file, or the best responsible bid of a bidder submitting his own plans and specifications. If, in the opinion of the commission, all bids are unsatisfactory, they may reject all of them and readvertise, and in

such case all such bid proposal deposits shall be returned to the bidders; but, if the contract is let, then all bid proposal deposits shall be returned to the bidders, except that of the successful bidder, which shall be retained until a contract is entered into for the purchase of such material or doing of such work. A bond shall be given to the port district by the successful bidder for the performance of the contract and otherwise conditioned as required by law, with surety satisfactory to the commission, in an amount to be fixed by the commission, but not in any event less than twenty-five percent (25%) of the contract price. If said bidder fails to enter into the contract in accordance with his bid and furnish such bond within ten (10) days from the date on which he is notified that he is the successful bidder, the check or money order and the amount thereof shall be forfeited to the port district, or the port district shall recover the amount of the surety bid bond. In the alternative, a port district may, by passage of a resolution by the board of commissioners, elect to exclusively follow the provisions of chapter 28, title 67, Idaho Code, concerning procurement. [1969, ch. 55, § 71, p. 144; am. 2005, ch. 213, § 42, p. 637.]

**70-1614. Leases and contracts without notice or bond.** — Port districts may enter into leases and contracts of every kind and nature with the United States of America or any of its departments or instrumentalities, the state of Idaho, or of sister states, or any of their departments or instrumentalities or with any municipal, quasi-municipal or public corporation thereof without notice and without requiring such bodies to provide bond to secure the performance thereof. [1969, ch. 55, § 72, p. 144.]

**70-1615. Gifts — Improvement and use.** — Port commissioners of any port district are hereby authorized to accept for and on behalf of said port district, gifts of real and personal property, to improve the same, and to use the same for all proper port purposes. [1969, ch. 55, § 73, p. 144.]

**70-1616. Lease of property — Performance bond or other financial guaranty.** — A port district may lease all real and personal property owned or controlled by it, and/or improvements thereon, upon such terms as the port commission deems proper; provided, that no lease shall be for a period longer than fifty (50) years, and each lease of real property shall be secured by a bond, with surety satisfactory to the port commission, or by such other rental insurance or financial guaranty as may be deemed sufficient by the port commission, conditioned to perform the terms of such lease, including the payment in lieu of taxes provided for in this act; provided further, that where the property is held by the district under lease from the United States government or any agency, instrumentality or political subdivision thereof, the port commission may sublease said property, with option for extensions, up to the total term and extensions thereof permitted by such United States lease, but in any event not to exceed ninety (90) years; provided further, that in a lease, the term of which exceeds five (5) years, and when at the option of the port commission it is so stipulated in the lease, the commission shall accept, with surety satisfactory to it, a



bond or other such rental insurance or financial guaranty satisfactory to the port commission, conditioned to perform the terms of the lease for some part of the term, in no event less than five (5) years unless the remainder of the unexpired term is less than five (5) years, in which case for the full remainder and in every such case the commission shall require of the lessee, another or other like bond or other rental insurance or financial guaranty to be delivered within two (2) years, and not less than one (1) year prior to the expiration of the period covered by the existing bond, covering an additional part of the term in accordance with the foregoing provisions in respect to the original bond, and so on until the end of the term so that there will always be in force a bond or other rental insurance or financial guaranty securing the performance of the lease, and the penalty in each bond or other rental insurance or financial guaranty shall be not less than the rental for one-half ( $\frac{1}{2}$ ) the period covered thereby, but no bond or other rental insurance or financial guaranty shall be construed to secure the furnishing of any other bond or other rental insurance or financial guaranty. [1969, ch. 55, § 74, p. 144; am. 2001, ch. 165, § 1, p. 575.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1604.

**70-1617. State-owned lands within port area — Development — Lease.** — The port commissioners shall have full power and authority to improve, use for all port purposes and/or let lands belonging to the state of Idaho within the area encompassed by the port district's plan of harbor improvement and port development, and/or its plan for industrial development in the same manner and under the same procedure as herein provided for the improvement, use and/or letting of land belonging to the port district provided that such real property is not then being utilized by the state or any legal subdivision or agency thereof, in which case the said rights shall not accrue to the port district until the said real property becomes surplus to such entity; provided further, in case of such leasing, the port commission shall determine which portion of the resulting rental is allocable to the land belonging to the state, and which is allocable to improvements placed, or to be placed, thereon, and that portion allocable to the land shall be paid by the port, as received, to the state treasurer; provided further, should the state question the allocation as made by the port commission, then the matter shall be determined by appraisal, the state and the port district each choosing disinterested appraisers, and the two (2) so chosen choosing a third; the decision of a majority of the appraisers concerning such allocation of rental shall be determinative of the matter, unless the same be modified or changed by the district court of the judicial district in which is situate the city for which the port is named, after hearing upon petition of either body, and after such notice as such court shall direct; provided further, that all bonds given to secure the payment of rentals, and the performance of any such lease, shall be payable jointly to the port district and the state of Idaho as their interest appears, based upon such allocation. Payment by a lessee



of the amount of each periodic rental payment set by the port commission upon such property shall discharge such lessee and/or the lessee's sureties pro tanto from any further liability as to each such rental payment made, and the allocation thereof between such port district and the state shall impose no liability or obligation upon such lessee and/or surety, nor shall any dispute or litigation as to such allocation in any way cause an increase in or otherwise affect the payment to be made by such lessee during the leasehold period. [1969, ch. 55, § 75, p. 144.]

**70-1618. State-owned lands — Acquisition by port districts. —**

Port districts shall have the right to acquire all state-owned real property, whether now owned or hereafter acquired in any manner, including lands reclaimed from the beds of navigable streams as a result of diking or other public improvements, when such real property is within the area encompassed by the port district's plan of harbor improvement and port development and/or its plan of industrial development, provided that such real property is not then being utilized by the state or any political subdivision or agency thereof, in which case the rights shall not accrue to the port district until the real property becomes surplus to such entity. A port commission desiring to acquire such real property shall so notify the state board of land commissioners, which shall thereupon, after appraisal thereof if deemed necessary, for adequate and valuable consideration, convey such real property to such port district by negotiated or exchange sale, and the provisions of this act, as to such lands, shall be in lieu of the provisions of title 58, Idaho Code.

Provided that sections 70-1617, 70-1618 shall not apply to any state lands upriver of any highway bridge not having a lift or draw span. [1969, ch. 55, § 76, p. 144.]

**STATUTORY NOTES**

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1604.

**RESEARCH REFERENCES**

**A.L.R.** — Cost of substitute facilities as measure of compensation paid to state or municipality for condemnation of public property. 40 A.L.R.3d 143.

**70-1619. Lease of property — Payment in lieu of taxes. —** If a port commission shall propose to lease any facility owned by the port which would be subject to ad valorem taxes of this state and/or its political subdivisions, if owned by a nonexempt taxpayer, to any legal entity which is not entitled to such tax exemption under the laws of this state, or if any such nonexempt taxpayer shall, at its expense, construct any facility upon land owned by and leased from any such port district, in either event such port district shall first cause such facility to be valued by the assessor of the county in which the facility is situate. The assessor shall value such facility in the same manner as though it were being valued for the purpose of assessment of ad valorem taxes by the county. The assessor shall certify to

the commission the amount of such valuation. The tax collector of such county shall, at the request of the commission, certify the amount of ad valorem taxes which would have been paid by a nonexempt taxpayer upon such valuation in the next preceding tax year, which sum is herein referred to as the "lieu tax."

The commission shall add to any payments to be made by any lessee under such lease, the amount of the lieu tax, to be paid annually to the port in addition to all other sums due under such lease. The amount of the lieu tax payment shall remain the same during the original term of such lease.

The proceeds of the lieu tax payment shall be remitted by the commission, forthwith upon their receipt, to the county tax collector, who shall disburse such proceeds to all taxing bodies and/or agencies receiving general ad valorem tax proceeds in any such year, on the same basis as other ad valorem taxes are disbursed.

Upon any extension of the lease, whether by reason of an option contained in such original lease or otherwise, and upon any re-leasing of such land or facility, the facility shall be again valued and certified by such assessor and the new valuation and lieu tax payment determined by the commission in the same manner, and any such extension or re-leasing shall be subject to the annual payment by the lessee of the new lieu tax figure.

All such leases shall be so written that failure of the lessee to pay all such lieu tax moneys prior to the 20th day of December in each year of such lease shall constitute a breach thereof.

The port district shall not be liable for the payment of any such sums if not made by its lessees.

The provisions of this section shall not apply to the letting, leasing or rental by port districts of any structures upon port-owned property, for the purpose of use as a dwelling unit or dwelling units, or for casual or interim use not related to the port district plan of harbor improvement and port development and/or its plan for industrial development, nor to any lease for a term of one (1) year or less. [1969, ch. 55, § 77, p. 144; am. 1974, ch. 121, § 1, p. 1296.]

**70-1620. By-product and waste material disposition.** — If the conduct of any port district function shall result in the production of any fill, waste, or by-product material which would otherwise have belonged to this state, specifically including, but not limited to, sand and gravel from the beds of navigable bodies of water and/or non-navigable bodies of water belonging to this state, the port district may use or sell the same, without regard to any other or conflicting provision of law relating to the ownership, regulation or disposition thereof, and for its lawful purposes, port districts shall have the right to remove sand, gravel and other material and by-products from the beds of navigable bodies of water belonging to the state and/or of non-navigable bodies of water belonging to the state whether now or hereafter submerged or dried up, without the necessity of paying compensation therefor. [1969, ch. 55, § 78, p. 144.]

## CHAPTER 17

## PORT DISTRICTS — BUDGET AND FISCAL MATTERS

## SECTION.

70-1701. Fiscal year.  
 70-1702. Tax levy.  
 70-1703. Budget — Hearing.  
 70-1704. Budget hearing — Notice.  
 70-1705. Budget — Inspection.  
 70-1706. Hearing — Petition — Additional election.  
 70-1707. Tax levy — Certification.  
 70-1708. Supplemental and amended budgets.  
 70-1709. Loans and warrants in anticipation of revenues.  
 70-1710. Port funds — Deposit.  
 70-1711. Port funds — Investments.  
 70-1712. Sinking, capital acquisition, and improvement funds.

## SECTION.

70-1713. Incidental expense fund.  
 70-1714. Port funds — Disbursements.  
 70-1715. Port auditor.  
 70-1716. General obligation bonds — Elections.  
 70-1717. General obligation bonds — Proposition to voters.  
 70-1718. General obligation bonds — Form and terms.  
 70-1719. General obligation bonds — Sale.  
 70-1720. General obligation bonds — Refunding.  
 70-1721. General obligation bonds and refunding bonds — Taxes for payment.

**70-1701. Fiscal year.** — The fiscal year of all port districts shall begin on the first day of July in each year. [1969, ch. 55, § 79, p. 144.]

**70-1702. Tax levy.** — The port commission shall, prior to the 13th day of June in each year, determine the tax levy for the next ensuing fiscal year as provided in section 63-803, Idaho Code, which levy for any such year, for all purposes, except the payment of the principal and interest of the general bonded indebtedness of the port, shall not exceed one-tenth percent (.1%) of the market value for assessment purposes on all taxable property in such port district. [1969, ch. 55, § 80, p. 144; am. 1995, ch. 82, § 32, p. 218; am. 1996, ch. 322, § 72, p. 236.]

## STATUTORY NOTES

**Effective Dates.** — Section 73 of S.L. 1996, ch. 322 provided that the act shall be in full force and effect on and after January 1, 1997.

**70-1703. Budget — Hearing.** — Prior to certifying to the boards of county commissioners as hereinafter provided, the levies made by the port commission, said port commission shall adopt a budget and shall cause to be called and held a public hearing upon such budget. [1969, ch. 55, § 81, p. 144.]

**70-1704. Budget hearing — Notice.** — Notice of the budget hearing meeting shall be posted at least ten (10) full days prior to the date of said meeting in at least one (1) conspicuous place in each commissioner district to be determined by the commission, a copy of such notice shall also be published in a daily or weekly newspaper published within such district, in one (1) issue thereof, during such ten-day period. The place, hour and day of such hearing shall be specified in said notice, as well as the place where such budget may be examined prior to such hearing. A full and complete copy of



such proposed budget shall be published with and as a part of the publication of such notice of hearing. [1969, ch. 55, § 82, p. 144.]

**70-1705. Budget — Inspection.** — Such budget shall be available for public inspection from and after the date of the posting of notices of hearing as in this act provided, at such place and during such business hours as the commission may direct. [1969, ch. 55, § 83, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**70-1706. Hearing — Petition — Additional election.** — A quorum of the port commission shall attend such hearing and shall explain the port budget and hear any objections thereto.

In the event the port district levy, excluding any sums levied in connection with any bonded indebtedness of the district, is in excess of three (3) mills, or six hundredths of one per cent (.06%) of market value for assessment purposes, for such fiscal year, and in the further event at such hearing that ten per cent (10%) of the number of electors voting in the area embraced by the port district in the most recent general election shall sign a petition calling for an election on the question of the tax levy which the port commission shall be authorized to make, then, in those events, the commission shall call and hold an election, subject to the provisions of section 34-106, Idaho Code, upon the question of the making of such levy provided that, in no case shall the authority of the port commission to determine and certify such general levy be limited below three (3) mills, or six hundredths of one per cent (.06%) of market value for assessment purposes, in any fiscal year, and such election shall be solely upon the question of any such levy in excess of three (3) mills, or six hundredths of one per cent (.06%) of market value for assessment purposes. At the election the majority of qualified electors voting in the whole port district shall determine whether or not the levy of the port commission in excess of said three (3) mills, or six hundredths of one per cent (.06%) of market value for assessment purposes, shall be certified to said county commissioners. Such levy shall in no event exceed the maximum levy provided in this chapter. [1969, ch. 55, § 84, p. 144; am. 1995, ch. 118, § 110, p. 417.]

**70-1707. Tax levy — Certification.** — When the amount of the levy has been determined, the port commission shall certify the amount of the levy, the date thereof, the year for which the levy has been made or is to be made, which shall be the ensuing port fiscal year, and the name of the port district, to the clerk of the board of county commissioners of each county in which the district exists. Such board of county commissioners shall at the time of making the annual county levies, make a levy upon all of the taxable property in said port district, within its boundaries, not exempt from taxation, which levy shall be the same as determined by the port commis-

sion, and shall thereafter certify the same to the county auditor. [1969, ch. 55, § 85, p. 144; am. 1995, ch. 82, § 33, p. 218.]

**70-1708. Supplemental and amended budgets.** — A port commission may adopt by resolution one or more supplemental or amended budgets at any time during the fiscal year. Such supplemental or amended budgets shall be adopted only after public hearing. Notice of such hearing, including a full and complete copy of such proposed amended or supplemental budget, shall be given by a single publication of a notice containing the date, place and hour of the hearing, in a newspaper published in the district. Such publication shall be at least ten (10) days prior to the hearing date. [1969, ch. 55, § 86, p. 144.]

**70-1709. Loans and warrants in anticipation of revenues.** — Any port commission is hereby authorized after making and certifying any such levy and prior to the receipt of taxes to be raised by levy in any fiscal year, to borrow money or issue warrants of the district in anticipation of the revenues to be derived by such district, and such indebtedness shall be paid and such warrants shall be redeemed from the first moneys available from such taxes when collected. [1969, ch. 55, § 87, p. 144.]

**70-1710. Port funds — Deposit.** — The port treasurer shall create such funds as the port commissioners shall direct, into which he shall place all receipts of the port district, in such manner and amounts as the port commission shall direct. Any interest which may be collected on any port funds shall belong to such port district and shall be deposited to its credit in the proper funds. [1969, ch. 55, § 88, p. 144.]

#### STATUTORY NOTES

**Cross References.** — Public depository law, § 57-101 et seq.

**70-1711. Port funds — Investments.** — The port commission shall have the authority to direct the port treasurer to invest the moneys in any sinking funds or any capital acquisition or improvement funds of the district, as well as any other funds which the commission shall determine to be in excess of its current cash requirements, for the operation and maintenance [maintenance] of the district, in negotiable, general obligation bonds or other evidence of indebtedness of the United States or of this state or any municipal corporation or political subdivision thereof, or in time certificates of deposit from any banking institution of this state, chartered under the laws of the United States of America or of this state, or as provided in § 70-1802. Such investments shall be in lieu of depositing said moneys in the designated depositories as provided by the public depository law. The port treasurer shall likewise reduce such bonds, evidence of indebtedness or certificates of deposit to cash, or substitute other of such securities therefor, as when said port commission may direct. [1969, ch. 55, § 89, p. 144.]

**STATUTORY NOTES**

**Compiler's Notes.** — The bracketed word "maintenance" was inserted by the compiler.

**70-1712. Sinking, capital acquisition, and improvement funds.** — Each board of port commissioners may provide such sinking fund or sinking funds as may be necessary to give effect to the provisions of this act, and may further provide capital acquisition funds and improvement funds for future capital acquisitions and improvements. [1969, ch. 55, § 90, p. 144.]

**STATUTORY NOTES**

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1705.

**70-1713. Incidental expense fund.** — Each board of port commissioners may create an incidental expense fund in such amount as the port commission may direct. Such incidental expense fund may be kept and maintained in a bank or banks designated by the commission, and each such depository shall be required to give bonds or securities to the port district for the protection of such incidental expense fund, in the amount of the fund authorized by the commission, if not otherwise secured by Federal Deposit Insurance Corporation insurance coverage. Vouchers may be drawn to reimburse said incidental expense fund and such vouchers shall be approved by the port commission. Incidental expenses of the port district may be paid from said incidental expense fund, without prior approval of the port commission, and all such disbursements therefrom shall be made by check signed by the port manager or other such person as the port commission shall direct. All expenditures from said incidental expense fund shall be itemized in writing to the port commission, at least once per month at a meeting of the commission. The person disbursing said funds shall be required to give bond to the port district in the full authorized amount of said incidental expense fund for the faithful performance of his duties in connection with the disbursement of moneys therefrom. [1969, ch. 55, § 91, p. 144.]

**70-1714. Port funds — Disbursements.** — Except for the incidental expense fund provided for in this act, funds of the district shall be disbursed only upon order of or voucher approved by the port commission. Such approval may be by approval of a settlement sheet, listing any number of such vouchers and showing the date thereof, the person making claim for disbursement, the purpose of the disbursement in general terms and the amount of the disbursement. Such disbursement shall be by check or draft signed by any two (2) of the following named entities, to-wit: the port district manager or any duly elected, qualified and acting member of the port commission. The signature of one (1) of the port commissioners signing any such check or draft may be by facsimile. [1969, ch. 55, § 92, p. 144; am. 1971, ch. 58, § 1, p. 133.]



## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" ch. 58 declared an emergency. Approved  
see Compiler's notes, § 70-1705. March 4, 1971.

**Effective Dates.** — Section 2 of S.L. 1971,

**70-1715. Port auditor.** — The port commission shall appoint a port auditor who shall be a certified public accountant of the state of Idaho. The originals of all port vouchers, all canceled checks and drafts, all bank statements and other documents which in the opinion of the port auditor reasonably relate to the financial and fiscal affairs of the district shall be delivered to and held by the port auditor who shall prepare and maintain the books of account of the port district. All such vouchers, checks, drafts, instruments, books of account and records shall be public records, and upon the termination of the appointment of any port auditor, shall be forthwith delivered by such auditor to the port commission. The port auditor shall prepare such financial statements as the port commission shall direct, and not less than once each quarter shall furnish to the port commission a written statement of the receipts and disbursements of the port district for the preceding quarter year, and of all port district funds and accounts, which quarterly statements shall be certified by the port auditor and filed with the county auditor of each of the counties in which the port district is located, and an annual statement shall be filed with the public utilities commission. The annual financial statement of the district, so prepared, shall be published in a newspaper printed within the district, by one (1) insertion thereof, within forty-five (45) days of the end of the port district fiscal year. Such publication shall include a statement that the original of such financial statement is on file, and may be examined at the office of the county treasurer of each county in which the port district, or any part thereof, exists. [1969, ch. 55, § 93, p. 144.]

**70-1716. General obligation bonds — Elections.** — Each port district may, with the assent of two-thirds (⅔) of the qualified voters of the district voting thereon at a port election called for that purpose, and held subject to the provisions of section 34-106, Idaho Code, contract indebtedness or borrow money for district purposes and may issue general obligation bonds therefor, provided that total indebtedness of the district at any such time, excluding that indebtedness evidenced by revenue bonds, shall not exceed one percent (1%) of the market value for assessment purposes of the taxable property in the district to be ascertained by the last assessment for state and county purposes previous to incurring the indebtedness.

The district may issue general district bonds evidencing any such indebtedness, payable at any time not exceeding thirty (30) years from the date of the bonds. [1969, ch. 55, § 94, p. 144; am. 1971, ch. 25, § 8, p. 61; am. 1980, ch. 350, § 27, p. 887; am. 1995, ch. 118, § 111, p. 417.]

## STATUTORY NOTES

**Effective Dates.** — Section 9 of S.L. 1971, ch. 25 declared an emergency. Approved February 16, 1971.

**70-1717. General obligation bonds — Proposition to voters.** — The proposition submitted to the voters for the authorization of general obligation bonds shall state generally the purposes for which said bonds are to be issued, the maximum effective interest rate to be borne by such bonds, and the maximum number of years within which such bonds shall mature. [1969, ch. 55, § 95, p. 144; am. 1970, ch. 176, § 4, p. 508.]

**70-1718. General obligation bonds — Form and terms.** — Such general obligation bonds shall be in such form, bear such date or dates, mature at such time or times, be in such denominations, bear interest at such rate or rates, be payable at such time or times, be payable at such place or places, be in such form, either coupon or registered or both, carry such registration privileges and be subject to such terms of redemption as the port commission shall by resolution determine. Such bonds shall be executed in the name of the port district by the manual or facsimile signature of the president of the port commission and shall have the seal of the port district impressed, imprinted or reproduced thereon, and attested by the manual or facsimile signature of the secretary of the port commission. One (1) of such signatures must be manual. The coupons appertaining to such bonds shall bear the facsimile signatures of such officials. [1969, ch. 55, § 96, p. 144; am. 1970, ch. 176, § 5, p. 508.]

**70-1719. General obligation bonds — Sale.** — Such general obligation bonds shall be sold in such manner as the port commission shall by resolution direct, either at public or private sale and at a price of not less than par plus accrued interest to date of delivery and payment. The maximum effective interest rate may not exceed the maximum interest rate specified in the proposition authorizing the bonds. [1969, ch. 55, § 97, p. 144.]

**70-1720. General obligation bonds — Refunding.** — The port commission of any port district may by resolution, without submitting the proposition to the voters, provide for the issuance of general obligation refunding bonds, to refund any outstanding general obligation bonds of the district at or prior to maturity or the first optional redemption date. Such refunding bonds may be issued to refund parts or all of various issues or series of outstanding bonds. The principal amount of the refunding bonds may not exceed the principal amount of the bonds to be refunded. The provisions of this act relating to the form, terms, conditions, covenants, issuance and sale of general obligation bonds shall be applicable to such general obligation refunding bonds. [1969, ch. 55, § 98, p. 144.]

STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1705.

**70-1721. General obligation bonds and refunding bonds — Taxes for payment.** — The port commission shall cause to be levied annually at the time and in the manner general port district taxes are levied upon all the taxable property within the district, in addition to all other taxes, a tax sufficient with other available funds to enable the district to pay the principal of and interest on such bonds as the same become due. Such taxes shall be levied, assessed, certified, extended and collected by the proper officers and at the times and in the manner other port district taxes are levied, assessed, certified, extended and collected until the principal of and interest on all such bonds shall have been fully paid. All of such taxes so collected shall be credited to a separate port district fund and shall be used solely to pay the principal of and interest on such bonds. [1969, ch. 55, § 99, p. 144.]

CHAPTER 18

PORT DISTRICTS — REVENUE BONDS AND WARRANTS

SECTION.

- 70-1801. Revenue bonds authorized.
- 70-1802. Revenue bonds — Purposes.
- 70-1803. Revenue bonds — Terms — Interest rate.
- 70-1804. Revenue bonds — Sources of payment — Sinking funds — Negotiable instruments.
- 70-1805. Revenue bonds — Covenants and conditions — Trustees.

SECTION.

- 70-1806. Revenue bonds — Signing and sealing — Interest coupons — Sale.
- 70-1807. Revenue warrants — Terms and covenants.
- 70-1808. Funding or refunding bonds.
- 70-1809. Construction of revenue bond and warrant provisions.

**70-1801. Revenue bonds authorized.** — The port commission of any port district is authorized, for the purpose of carrying out the lawful powers granted port districts by the laws of the state, to contract indebtedness and to issue revenue bonds evidencing such indebtedness in conformity with this act. [1969, ch. 55, § 100, p. 144.]

STATUTORY NOTES

**Compiler's Notes.** — For words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**70-1802. Revenue bonds — Purposes.** — All such revenue bonds authorized under the terms of this act may be issued and sold by the port district from time to time and in such amounts as is deemed necessary by the port commission to provide sufficient funds for the carrying out of all port district powers and, without limiting the generality thereof, shall include the following: acquisition, construction, reconstruction, maintenance, repair and operation of industrial and economic development facili-



ties and port properties and facilities, including the cost thereof, engineering, inspection, accounting, fiscal and legal expenses, the cost of issuance of bonds, including printing, engraving and advertising and other similar expenses, the establishment of bond reserves, and the payment of interest on bonds issued for any project during the period of actual construction and for not exceeding twelve (12) months after the completion thereof. [1969, ch. 55, § 101, p. 144; am. 2001, ch. 189, § 3, p. 651.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1801. ch. 189 declared an emergency retroactively to January 1, 2001 and approved March 26, 2001.

**Effective Dates.** — Section 4 of S.L. 2001, 2001.

**70-1803. Revenue bonds — Terms — Interest rate.** — Such revenue bonds shall bear such date or dates, mature at such time or times, be in such denominations, bear interest at a rate or rates, payable at such time or times, be payable at such place or places, be in such form either coupon or registered or both, carry such registration privileges and be subject to such terms of redemption as the port commission shall by resolution determine. [1969, ch. 55, § 102, p. 144; am. 1970, ch. 133, § 22, p. 309.]

#### STATUTORY NOTES

**Effective Dates.** — Section 23 of S.L. 1970, ch. 133 declared an emergency. Approved March 9, 1970.

**70-1804. Revenue bonds — Sources of payment — Sinking funds — Negotiable instruments.** — Bonds issued under the provisions of this act shall be payable solely out of revenues of the port district other than those revenues derived from ad valorem taxes. Such bonds shall be authorized by resolution of the port commission, which resolution shall create a special fund or funds into which the port commission shall obligate and bind the port district to set aside and pay any part or parts of, or all of, or a fixed proportion of, or a fixed amount of the gross revenue of the port district sufficient to pay the principal of and interest on such bonds as the same shall become due and, if deemed necessary, to maintain adequate reserves therefor. Such fund or funds shall be drawn upon for the sole purpose of paying the principal of and interest on bonds issued pursuant to this act.

The bonds shall be negotiable instruments within the provisions and intent of the laws of this state even though they shall be payable solely from such special fund or funds, and the ad valorem tax revenue of the port district may not be used to pay, secure or guarantee the payment of the principal of an interest on such bonds. The bonds and any coupons attached thereto shall state upon their face that they are payable solely from such special fund or funds. If the port commission fails to set aside and pay into such fund or funds the payment provided for in such resolution, the holder

of any such bonds may bring suit to compel compliance with the provisions of the resolution. [1969, ch. 55, § 103, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1801.

**70-1805. Revenue bonds — Covenants and conditions — Trustees.** — The port commission may provide such covenants as it may deem necessary to secure and guarantee the payment of the principal of and interest on such bonds, including, but not limited to, covenants to create reserve accounts and to authorize the deposit of certain moneys therein for the purpose of securing and guaranteeing the payment of such principal and interest, to establish, maintain and collect tariffs, rates, charges, fees, rentals and sales prices sufficient to pay and guarantee the payment of such principal and interest and to maintain an adequate coverage over annual debt service, to appoint a state or national bank or trust company as trustee for the bondholders to hold, invest and disburse moneys set aside and pledged to pay and guarantee the payment of such bonds and/or as trustee for the safeguarding and disbursing of the proceeds of the sale of such bonds, to fix such powers and duties of such trustee or trustees as may be found necessary to carry out the purposes of this act, and to make any and all other covenants not inconsistent with the provisions of this act which in the judgment of the port commission will increase the marketability of such bonds. The port commission may also provide that revenue bonds payable out of the same source or sources may be later issued on a parity with any revenue bonds being issued and sold. The provisions of this act and any resolution or resolutions providing for the authorization, issuance and sale of such bonds, shall constitute a contract with the holders of such bonds and the provisions thereof shall be enforceable by any owner or holder of such bonds by mandamus or any appropriate suit, action or proceeding at law and equity in any court of competent jurisdiction. [1969, ch. 55, § 104, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1801.

**70-1806. Revenue bonds — Signing and sealing — Interest coupons — Sale.** — Such bonds shall be signed on behalf of the port district by the president of the port commission and shall be attested by the secretary of the port commission, one (1) of which signatures may be a facsimile signature, and shall have the seal or facsimile seal of the port district impressed thereon. All interest coupons attached thereto shall be signed with the facsimile signatures of said officials. Such bonds shall be sold in the manner and at such price as the port district shall deem advisable, either at public or private sale. [1969, ch. 55, § 105, p. 144.]

**70-1807. Revenue warrants — Terms and covenants.** — Port districts may also issue revenue warrants for the same purposes for which they may issue revenue bonds and the provisions of this act relating to the terms, conditions, covenants, issuance and sale of revenue bonds shall be applicable to such revenue warrants. [1969, ch. 55, § 106, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1801.

**70-1808. Funding or refunding bonds.** — The port commission of any port district may by resolution, from time to time provide for the issuance of funding or refunding revenue bonds to fund or refund any outstanding revenue or other warrants, bonds, and any premiums thereon, and coupons evidencing interest upon any such bonds at or before the maturity or first optional redemption date of such coupons, warrants or bonds, and may combine various outstanding revenue warrants and parts or all of various series and issues of outstanding revenue bonds and matured coupons in the amount thereof to be funded or refunded.

The port commission shall create a special fund for the sole purpose of paying the principal of and interest on such funding or refunding revenue bonds, into which fund the commission shall obligate and bind the port district to set aside and pay any part or parts of, or all of, or a fixed proportion of, or a fixed amount of the gross revenue of the port district sufficient to pay such principal and interest as the same shall become due, and if deemed necessary to maintain adequate reserves therefor.

Such funding or refunding bonds shall be negotiable instruments within the provisions and intent of the laws of this state, and the tax revenue of the port district may not be used to pay, secure, or guarantee the payment of the principal of and interest on such bonds.

The port district may exchange such funding or refunding bonds for the warrants, bonds, and coupons being funded or refunded, or it may sell such funding or refunding bonds in the manner and at such price as the port commission shall deem to be for the best interest of the district and its inhabitants, either at public or private sale.

The provisions of this act relating to the terms, conditions, covenants, issuance, and sale of revenue bonds shall be applicable to such funding or refunding bonds except as may be otherwise specifically provided in this section. [1969, ch. 55, § 107, p. 144; am. 2001, ch. 164, § 1, p. 574.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1801.

**70-1809. Construction of revenue bond and warrant provisions.** — This act shall be complete authority for the issuance of the revenue bonds and warrants hereby authorized, and shall be liberally construed to accom-



plish its purposes. Any restrictions, limitations or regulations relative to the issuance of such bonds or warrants contained in any other act shall not apply to the revenue bonds or warrants issued under this act. Any laws inconsistent herewith shall be deemed modified to conform with the provisions of this act for the purpose of this act only. [1969, ch. 55, § 108, p. 144.]

### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1801.

## CHAPTER 19

### INDUSTRIAL DEVELOPMENT DISTRICTS IN PORT DISTRICTS

#### SECTION.

- 70-1901. Industrial development districts authorized — Notice — Hearing.
- 70-1902. Tax-title lands conveyed to port district.
- 70-1903. Private lands.
- 70-1904. Adoption of plan.
- 70-1905. Improvements to follow plan adopted.
- 70-1906. Amendment, modification or change of plan.

#### SECTION.

- 70-1907. Industrial development districts — Powers.
- 70-1908. Industrial development districts — Sale or exchange of property.
- 70-1909. Sale — Notice — Hearing.
- 70-1910. Determination concerning sale or exchange.
- 70-1911. Sale — Contract or bid.
- 70-1912. Sale — Plans for development.
- 70-1913. Covenants as to use — Forfeiture.

**70-1901. Industrial development districts authorized — Notice — Hearing.** — A port commission may, after a public hearing thereon, notice of which shall be published in a daily newspaper of general circulation in the port district at least once a week for two (2) successive weeks, create industrial development districts within the port district and define the boundaries thereof, if it finds that the creation of such industrial development district is proper and desirable in furthering industrial development in such port district, and/or for urban renewal therein. [1969, ch. 55, § 109, p. 144.]

**70-1902. Tax-title lands conveyed to port district.** — Any lands in an industrial development district acquired by the county as a result of delinquent taxes may, at the request of the port commission, be conveyed by the county commissioners to the port district either gratuitously or for the amount of the delinquent taxes, penalties and interest accrued against said land, as the county commissioners shall determine. From and after such conveyance, title to said property shall repose in the port district, its successors or assigns. Nothing in this section shall prevent such county commissioners from granting or selling such lands to any other municipality or public body which may make application therefor. [1969, ch. 55, § 110, p. 144.]

**70-1903. Private lands.** — Port districts may acquire privately owned property within such industrial development district and, if necessary, exercise the right of eminent domain in securing the same, in the same

manner as in this act provided for the acquisition by port districts of other properties by eminent domain, provided, however, that such right of eminent domain for such industrial development district purposes shall not be exercised as to lands lying further than three-quarters ( $\frac{3}{4}$ ) of one (1) mile from the water edge of the slack water pool within such port district, created by any downriver dam; provided, further, that notwithstanding any other provisions of the port district law, neither a port district nor an industrial development district shall have power to acquire by eminent domain any existing and operating railroad facilities, without first securing from the public utilities commission a certificate that such acquisition is necessary for the public convenience and necessity. [1969, ch. 55, § 111, p. 144; am. 1970, ch. 3, § 1, p. 4.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**70-1904. Adoption of plan.** — No expenditure for acquisition or improvement of property in an industrial development district shall be made by a port district until a comprehensive plan for such industrial development shall have been adopted by the port commission in the same manner, and upon the same notice as provided in this act for the adoption of a comprehensive plan of harbor improvement and port development; provided that, moneys may be expended prior to the adoption of such plan for studies, preliminary engineering, and the planning of such industrial development district, either separately, or in connection with other studies and engineering of the district, and either by the district alone or in connection with other federal or state agencies or instrumentalities.

Recognizing that it will be necessary that port districts engage in long-range planning, and that it will normally be necessary to alter such plan from time to time, such plan need only be in general terms. [1969, ch. 55, § 112, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1903.

**70-1905. Improvements to follow plan adopted.** — When such general plan shall have been adopted as provided in section 70-1904, improvements to by [be] made by such commission in such industrial development district shall be made substantially in accordance therewith unless and until such general plan shall have been officially amended, modified or changed by the port commission. [1969, ch. 55, § 113, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "be" was inserted by the compiler.

**70-1906. Amendment, modification or change of plan.** — Such plan may be amended, modified or changed by the port commission at any time, after a public hearing thereon, notice of which shall be given in the same manner as is notice for the adoption of such plan, and such plan as amended, modified or changed shall be and remain the district's plan for such industrial development district, until the same shall again be amended, modified or changed by the port commission in the same manner. [1969, ch. 55, § 114, p. 144.]

**70-1907. Industrial development districts — Powers.** — All port districts wherein industrial development districts have been established are authorized and empowered to acquire by purchase or condemnation or both, all lands, property and property rights necessary for the development and improvement of such industrial development district; to exercise the right of eminent domain, subject to the provisions of section 70-1903, in the acquirement or damaging of all lands, property and property rights; to levy and collect assessments upon property and to expend its funds for the payment of all damages and compensation in acquiring such property and/or in carrying out the plan for which said industrial development district has been created; to develop and improve the lands within such industrial development district to make the same suitable and available for industrial uses and purposes; to dredge, bulkhead, fill, grade, and protect such property; to provide for water, light, power and fire protection facilities and services, streets, roads, bridges, highways, waterways, tracks and rail and water improvements; to execute leases of such land or property or any part thereof; and generally to exercise with respect to and within such industrial development districts all the power now or hereafter conferred by law upon port districts. [1969, ch. 55, § 115, p. 144.]

**70-1908. Industrial development districts — Sale or exchange of property.** — When a port commission deems it for the best interests of the district and the people thereof and in furtherance of its general plan of harbor improvement and port development or its plan of industrial development, or both, it may, sell, convey or exchange with or without additional consideration, any property, or part thereof, owned by it within an industrial development district. This section shall not be limited by any other or inconsistent provisions of this act. [1969, ch. 55, § 116, p. 144.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-1903.



**70-1909. Sale — Notice — Hearing.** — Prior to any such sale, or to any such exchange, the port commission shall hold a hearing thereon, for the purpose of hearing any objections thereto, and shall give notice of such hearing by publication in a newspaper within the port district at least once a week for two (2) successive weeks prior to such hearing.

The notice shall describe the property to be sold or exchanged, and state generally the terms of sale or exchange, and shall state the time and place of hearing thereon. [1969, ch. 55, § 117, p. 144.]

**70-1910. Determination concerning sale or exchange.** — Within three (3) days after the hearing the commission shall make its findings and determination on the advisability of making the sale or exchange, and enter its determination in its records, which determination, in the absence of a showing of fraudulent, capricious or arbitrary action, or of bad faith on the part of the commission, shall be conclusive. [1969, ch. 55, § 118, p. 144.]

**70-1911. Sale — Contract or bid.** — Any such sale may be by private agreement between the port district and the prospective purchaser or upon bid upon such terms as the port commission may direct. [1969, ch. 55, § 119, p. 144.]

**70-1912. Sale — Plans for development.** — Prior to the conveyance of such land, the port commission shall require the purchaser to file with the commission a plan, stating in detail the use such purchaser intends to make of such land. The commission may require such purchaser to file additional information as to such intended use and may require of him security as assurance that the property will be used for that purpose. [1969, ch. 55, § 120, p. 144.]

**70-1913. Covenants as to use — Forfeiture.** — The commission may, in securing any such bids, or in selling, exchanging or conveying any such property, specify conditions to be placed in the commission's instrument of conveyance of such property, and thereafter place such condition in such instrument, as covenants running with the land. Any violation of such covenants may result in a right by the port commission to cancel said conveyance and retake said property free and clear of any claim of the purchaser, when such instrument so provides. [1969, ch. 55, § 121, p. 144.]

## CHAPTER 20

### PORT DISTRICTS — MISCELLANEOUS PROVISIONS

#### SECTION.

70-2001. Liberal construction.

70-2002. Actions under previous laws ratified.

#### SECTION.

70-2003. Port-owned property not subject to taxation.

70-2004. Short title.

**70-2001. Liberal construction.** — The rules of strict construction shall have no application to the provisions of this act concerning port districts, but the same shall be liberally construed in all respects in order to

fully and effectively carry out the purposes and objects for which port districts are authorized. [1969, ch. 55, § 122, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 55, compiled as chapters 11-20 of this title.

**70-2002. Actions under previous laws ratified.** — The acts and proceedings of all port districts under the laws in effect prior to the effective date [February 25, 1969] of this act are hereby ratified and approved, and shall remain in full force and effect until the further action of such port district. [1969, ch. 55, § 123, p. 144.]

**70-2003. Port-owned property not subject to taxation.** — All property acquired by port districts for any purpose shall forthwith, upon such acquisition, be removed by the county assessor from the tax rolls of the county, and shall not be subject to taxation by any municipal corporation, political subdivision or instrumentality of this state. [1969, ch. 55, § 124, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — Section 125 of S.L. 1969, ch. 55 read: "If any part or parts of this act shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have

passed the remaining parts of this act if it had known that such part or parts hereof would be declared unconstitutional."

Section 126 of S.L. 1969, ch. 55 repealed chapter 1 of title 70.

**70-2004. Short title.** — This act may be cited as the "Port District Law." [1969, ch. 55, § 127, p. 144.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2001.

**Effective Dates.** — Section 128 of S.L.

1969, ch. 55 declared an emergency. Approved February 25, 1969.

### CHAPTER 21

#### IDAHO PORT DISTRICT ECONOMIC DEVELOPMENT FINANCING ACT

##### SECTION.

- 70-2101. Short title.
- 70-2102. Declaration of necessity and purpose — Liberal construction.
- 70-2103. Definitions.
- 70-2104. Powers.
- 70-2105. Conflict of interest.
- 70-2106. Bonds.
- 70-2107. Publication of proceedings — Contest period.
- 70-2108. Security for revenue bonds.

##### SECTION.

- 70-2109. Payment of revenue bonds — Nonliability of state and political subdivisions.
- 70-2110. Taxation.
- 70-2111. Conveyance of title to lessee.
- 70-2112. Powers not restricted — Law complete in itself.
- 70-2113. Investment of funds.
- 70-2114. Bonds eligible for investment.
- 70-2115. Exemption from public buildings

## SECTION.

construction and bidding re-  
quirements.

## SECTION.

70-2116. Tax exemption.  
70-2117. Severability.

**70-2101. Short title.** — This act may be referred to and cited as the “Idaho Port District Economic Development Financing Act.” [I.C., § 70-2101, as added by 1981, ch. 228, § 1, p. 457.]

**STATUTORY NOTES**

**Compiler’s Notes.** — The words “this act” refer to S.L. 1981, ch. 228, which is compiled as §§ 70-2101 — 70-2117.

**70-2102. Declaration of necessity and purpose — Liberal construction.** — (1) The legislature of the state of Idaho hereby finds:

- (a) That lack of sufficient employment opportunities in port districts seriously endangers the public health and welfare;
- (b) That there is a need to encourage the acquisition, construction, installation or equipping of economic development facilities which will increase or maintain employment opportunities in port districts;
- (c) That it is desirable to provide methods of financing the costs of acquiring, constructing, installing and equipping of economic development facilities which will increase or maintain employment opportunities in port districts; and
- (d) That the method of financing provided in this act is therefore in the public interest and serves a public purpose in protecting and promoting the health and welfare of the citizens of this state by encouraging the acquisition, construction, installation or equipping of economic development facilities to increase or maintain employment opportunities in port districts.

(2) It is the purpose of this act to authorize port districts to finance, acquire, construct, install, equip, own, lease and sell economic development facilities located in port districts to be financed for, or to be sold, leased or otherwise disposed of to persons other than municipal corporations or other political subdivisions, to the end that port districts may be able to promote the health and welfare of the people of this state; it is not intended by this act that any port district shall itself be authorized to operate any industrial or commercial enterprise or any such economic development facilities.

(3) This act shall be liberally construed to accomplish the intentions expressed herein. [I.C., § 70-2102, as added by 1981, ch. 228, § 1, p. 457.]

**STATUTORY NOTES**

**Compiler’s Notes.** — For words “this act” see Compiler’s notes, § 70-2101.

**70-2103. Definitions.** — In this act, unless the context otherwise clearly requires, the terms used herein shall have the meanings ascribed to them as follows:



(1) "Commission" means the port commission of any port district.

(2) "Person" means any individual, partnership, copartnership, firm, company, corporation (including public utilities), association, joint stock company, trust, estate, or any other legal entity, or their legal representatives, agents or assigns, other than municipal corporations or other political subdivisions.

(3) "Port district" means any port district of the state of Idaho.

(4) "Finance" or "financing" means the issuing of revenue bonds pursuant to authority herein contained by a port district for the purpose of using substantially all of the proceeds to pay all or any part of project costs or to reimburse any person for all or any part of project costs; provided, that title to or in any project so financed may at all times remain in a person other than the port district and in such case the revenue bonds of the port district shall be secured by a pledge of one or more notes, debentures, bonds or other obligations of such person.

(5) "Project" includes economic development facilities consisting of any properties, real or personal including, without limitation, any land, interest in land, building, structure, facility, system, fixture, improvement, appurtenance, machinery, equipment or any combination thereof, and all real and personal property deemed necessary therewith, located within the port district, used or useful in connection with a revenue-producing enterprise, having to do with or the end purpose of which is increasing or maintaining employment in the port district, and compatible with the purposes for which the port district was established.

(6) "Project costs" as applied to any project financed under the provisions of this act mean and include all or any part of the sum total of all reasonable or necessary costs incidental to the acquisition, construction, installation and equipping of such project including, without limitation, the cost of studies and surveys; plans, specifications, architectural and engineering services; legal, organization, marketing or other special services; financing, acquisition, demolition, construction, equipment and site development of new and rehabilitated buildings; rehabilitation, reconstruction, repair or remodeling of existing buildings and all other necessary and incidental expenses including an initial principal and interest reserve together with interest on revenue bonds issued to finance such project to a date six (6) months subsequent to the estimated date of completion. [I.C., § 70-2103, as added by 1981, ch. 228, § 1, p. 457.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

The words enclosed in parentheses so appeared in the law as enacted.

**70-2104. Powers.** — Each port district shall have the following powers together with all powers incidental thereto or necessary for the performance thereof:

(1) To determine the location of any project, whether upon real estate owned by the port district or by any person, and the manner of construction of any project to be financed under the provisions of this act, and to acquire,

construct, install, equip, own, finance, lease, sell, mortgage and dispose of the same, to enter into contracts for any and all of such purposes, to designate a person as its agent to determine the location and manner of construction of a project undertaken by such person under the provisions of this act and as agent of the port district, to acquire, construct, install, equip, own, lease, sell, mortgage and dispose of the same and to enter into contracts for any and all of such purposes;

(2) To lease or sell a project to any person upon such terms and conditions as the commission shall deem proper, and to charge and collect rent or other payments therefor and to terminate any such lease or sales agreement upon the failure of the lessee or other contracting party to comply with any of the obligations thereof; and to include in any such lease, if desired, provisions that the lessee thereof shall have options to renew the term of the lease for such period or periods and at such rent as shall be determined by the commission and/or to purchase such project for a nominal amount or otherwise or that at or prior to the payment of all of the revenue bonds issued by the port district for the financing of such project the port district may convey all or any portion of such project to the lessee or lessees thereof with or without consideration;

(3) To issue revenue bonds to finance the acquisition, construction, installation and equipping of a project and to refund such bonds, all as provided for in this act;

(4) Generally to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and services furnished or to be furnished by any project or any portion thereof and to contract with any person or other body public or private in respect thereof;

(5) To employ consulting engineers, architects, attorneys, accountants, construction and financial experts, superintendents, managers and such other employees and agents as may be necessary in its judgment and to fix their compensation;

(6) To refund outstanding obligations incurred by any person to finance the cost of a project including obligations incurred for projects undertaken and completed prior to or after the enactment of this act when the commission finds that such financing is in the public interest;

(7) To receive and to pledge as security for the payment of any bonds issued hereunder, any lease, purchase agreement, financing agreement, note, debenture, bond or other obligation by or on behalf of any person, and any revenues and receipts payable to the port district thereunder;

(8) To make loans to any person for the purpose of paying or reimbursing project costs in accordance with an agreement between the port district and such person; and

(9) To do all things necessary and convenient to carry out the purposes of this act.

No port district shall have power under the provisions of this act to operate any project as a business other than as a lessor or vendor. [I.C., § 70-2104, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2105. Conflict of interest.** — In the event a member of a commission is the person or is an officer, partner, employee, stockholder or beneficiary, in the case of a trust, of the person with whom the port district proposes to contract under the provisions of this act with respect to the acquisition and financing of a project and the issuance of revenue bonds, such member shall disclose such status and interest to the commission at a public meeting and shall abstain from voting on all matters before the commission related thereto. [I.C., § 70-2105, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2106. Bonds.** — All revenue bonds authorized to be issued hereunder may be issued as serial bonds or as term bonds or a combination of both types. All revenue bonds so issued shall be payable solely out of the revenues and receipts derived by the port district from the project provided with the proceeds thereof as may be designated in the proceedings of the commission under which the revenue bonds shall be authorized to be issued, provided that such revenue bonds shall not be secured by the full faith and credit or the taxing power of the state of Idaho, any port district or any other political subdivision of the state of Idaho, and such limitation shall be plainly printed on the face of each such revenue bond. Such revenue bonds may be executed and delivered by the port district at any time and from time to time in such amounts, may be in such form and denominations and of such terms and maturities, may be in fully registered form or in bearer form registrable either as to principal or interest or both, may bear such conversion privileges and be payable in such installments and at such time or times not exceeding forty (40) years from the date thereof, may be payable at such time or times and at such place or places whether within or without the state of Idaho and evidenced in such manner, may bear interest at such rate or rates per annum without regard to any interest rate limitation appearing in any other law, may be executed by the manual or facsimile signatures of such officers of the port district, and may contain such provisions not inconsistent herewith, all as shall be provided in the proceedings of the commission under which the revenue bonds shall be authorized to be issued. If deemed advisable by the commission there may be retained in the proceedings under which any such revenue bonds are authorized to be issued an option to redeem all or any part thereof as may be specified in such proceedings, at such price or prices and after such notice or notices and on such terms and conditions as may be set forth in such proceedings, but nothing herein contained shall be construed to confer on any port district the right or option to redeem any such revenue bonds except as may be



provided in the proceedings under which they shall be issued. Any revenue bonds issued hereunder may be sold at public or private sale for such price and in such manner and from time to time as may be determined by the commission, and the port district may pay, but solely and only from the proceeds of any such revenue bonds, all expenses, premiums, and commissions which the commission may deem necessary or advantageous in connection with the issuance thereof. Issuance by any port district of one or more series of revenue bonds for one or more purposes under this act shall not preclude it from issuing other revenue bonds in connection with the same project or any other project or for any other purpose hereunder, but the proceedings whereunder any subsequent bonds may be issued shall recognize and protect any prior pledge made for any prior issue of revenue bonds. Any revenue bonds issued hereunder at any time outstanding may at any time and from time to time be refunded by the issuance of refunding bonds in such amount as the commission may deem necessary but not exceeding an amount sufficient to refund the principal of the bonds so to be refunded, together with any unpaid interest thereon and any premiums, commissions, service fees and other expenses necessary to be paid in connection therewith. Any such refunding may be effected whether the bonds to be refunded shall have matured or shall thereafter mature, either by sale of the refunding bonds and the application of the proceeds thereof for the payment of the bonds to be refunded thereby, or by the exchange of the refunding bonds for the bonds to be refunded thereby with the consent of the holders of the bonds so to be refunded, and regardless of whether or not the bonds to be refunded were issued in connection with the same project or separate projects or for any other purpose hereunder, and regardless of whether or not the revenue bonds proposed to be refunded shall be payable on the same date or different dates or shall be due serially or otherwise. All such revenue bonds and the interest coupons applicable thereto, if any, are hereby made and shall be construed to be negotiable instruments. [I.C., § 70-2106, as added by 1981, ch. 228, § 1, p. 457.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2107. Publication of proceedings — Contest period.** — The resolution authorizing the issuance of any revenue bonds hereunder and the execution of an indenture as security therefor shall be published one (1) time in a newspaper of general circulation in the port district. Any such indenture, or other instrument authorized in such resolution to be executed, may be incorporated as an exhibit to such resolution but need not be published as part of the resolution. For a period of thirty (30) days from the date of such publication any person in interest may file suit in any court of competent jurisdiction to contest the regularity, formality or legality of the proceedings authorizing the revenue bonds, or the legality of such resolution and its provisions or of the revenue bonds to be issued pursuant thereto and the provisions securing the revenue bonds. After the expiration of such

thirty (30) day period no one shall have any right of action to contest the validity of the revenue bonds or of such proceedings or of such resolution or the validity of the pledges and covenants made in such proceedings and resolution and the revenue bonds and the provisions for their payment shall be conclusively presumed to be legal and no court shall thereafter have authority to inquire into such matters. [I.C., § 70-2107, as added by 1981, ch. 228, § 1, p. 457.]

**70-2108. Security for revenue bonds.** — The principal, interest and premium, if any, on any revenue bonds issued hereunder shall be secured by a pledge of the revenues and receipts out of which the same shall be made payable and may also be payable out of proceeds from the sale of the project acquired with proceeds of such revenue bonds, but shall not be secured by the full faith and credit or the taxing power of the state of Idaho, any port district or any other political subdivision of the state of Idaho. The resolution under which the revenue bonds are authorized to be issued and any indenture executed as security for the revenue bonds may contain any agreements and provisions respecting the maintenance of the properties covered thereby, the fixing and collection of rents for any portions thereof leased by the port district to others, the creation and maintenance of special funds, and the rights and remedies available in the event of default, including the designation of a trustee, which may be a bank or trust company, the principal place of business of which may be within or without the state of Idaho, all as the commission shall deem advisable and not in conflict with the provisions hereof. The pledge of the revenues and receipts to pay the principal, interest and premium, if any, on revenue bonds issued hereunder shall be valid and binding from the time when the agreement or the proceedings creating such pledge became binding upon the port district. The revenues and receipts so pledged and thereafter received by the port district shall immediately be subject to the lien of such pledge without any physical delivery of any lease, purchase agreement, financing agreement, note, debenture, bond or other obligation pursuant to which such revenues and receipts are payable to the port district, or any other act except that the proceedings or agreement by which such pledge is created shall be recorded in the records of the port district. The proceedings or agreement by which such pledge is created or a financing statement need not be filed or recorded under the uniform commercial code, or otherwise, except in the records of the port district as provided above. The lien of any such pledge shall be valid and binding and shall have priority as against all parties having claims of any kind in tort, contract or otherwise against the port district, irrespective of whether such parties have notice thereof. Each pledge and agreement made for the benefit or security of any of the revenue bonds issued hereunder shall continue effective until the principal, interest and premium, if any, on the revenue bonds for the benefit of which the same were made shall have been fully paid or provision for such payment duly made. In the event of default in such payment or in any agreement of the port district made as a part of the contract under which the revenue bonds were issued, whether contained in the proceedings authorizing the revenue bonds or in



any indenture executed as security therefor, said payment or agreement may be enforced by suit, mandamus or the appointment of a receiver in equity, or any one or more of said remedies. [I.C., § 70-2108, as added by 1981, ch. 228, § 1, p. 457.]

#### STATUTORY NOTES

**Compiler's Notes.** — The uniform commercial code, referred to in this section, is compiled as § 28-1-101 et seq.

**70-2109. Payment of revenue bonds — Nonliability of state and political subdivisions.** — Revenue bonds passed under the provisions of this act shall not be deemed to constitute a debt or liability of the state of Idaho, any port district or any other political subdivision of the state of Idaho, but shall be payable solely from the funds herein provided therefor. The issuance of revenue bonds under the provisions of this act shall not, directly or indirectly or contingently, obligate the state of Idaho, any port district or any other political subdivision of the state of Idaho to levy any form of taxation therefor or to make any appropriation for their payment. Nothing in this act shall be construed to authorize the creation of a debt of the state of Idaho or of the port district authorizing the issuance of such revenue bonds within the meaning of the constitution or statutes of the state of Idaho. All revenue bonds issued pursuant to the provisions of this act are payable and shall state that they are payable solely from the funds pledged for their payment in accordance with the resolution authorizing their issuance or in any indenture executed as security therefor, and that such revenue bonds are not secured by the full faith and credit or the taxing power of the state of Idaho, any port district or any other political subdivision of the state of Idaho. Neither the state nor the port district authorizing the issuance thereof shall in any event be liable for the payment of the principal, interest or premium, if any, on any such revenue bonds. No breach of any such pledge, obligation or agreement may impose any pecuniary liability upon the state or the port district authorizing the issuance thereof or any charge upon their general credit or against their taxing power. [I.C., § 70-2109, as added by 1981, ch. 228, § 1, p. 457.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2110. Taxation.** — To the extent permitted by the constitution, the property acquired by any port district pursuant to this act is exempt from taxation, except that during any period that such property is leased by a port district under a lease, or title thereto is retained by a port district under an installment purchase contract, taxes shall be payable to the same extent as if it were owned by such lessee or installment purchaser and such taxes shall be paid by such lessee or installment purchaser. [I.C., § 70-2110, as added by 1981, ch. 228, § 1, p. 457.]



## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2111. Conveyance of title to lessee.** — At or prior to the time the principal, interest and premium, if any, on any revenue bonds issued hereunder to provide a particular project have been fully paid, the port district may execute such deeds and conveyances as are necessary and required to convey its right, title and interest in such project to any person, provided that if such conveyance is made prior to when the revenue bonds are fully paid, the port district has determined that adequate provision has been made for the payment of the principal, interest and premium, if any, on the bonds as they become due. [I.C., § 70-2111, as added by 1981, ch. 228, § 1, p. 457.]

**70-2112. Powers not restricted — Law complete in itself.** — Neither this act nor anything herein contained shall be construed as a restriction or limitation upon any powers which any port district might otherwise have under any laws of the state of Idaho, but shall be construed as cumulative of any such powers. No proceedings, notice or approval shall be required for the issuance of any revenue bonds or any instrument as security therefor, except that no revenue bonds shall be issued hereunder until the commission shall by resolution adopted by a majority of the commission determine that the project to be financed with the proceeds of said revenue bonds will increase or maintain employment opportunities in the port district issuing said revenue bonds. The resolution containing the declaration of public interest or necessity herein required, shall recite the objects and purposes for which the revenue bonds are proposed to be issued, the amount of principal of the revenue bonds, and the source of revenues pledged to the payment of said bonds. [I.C., § 70-2112, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2113. Investment of funds.** — Each port district issuing revenue bonds hereunder may invest any funds received in connection therewith in bonds, notes, certificates of indebtedness, treasury bills or other securities constituting direct obligations of the United States of America; in certificates of deposit or time deposits constituting direct obligations of any bank as defined by the Idaho bank act, provided, however, that investments may be made only in those certificates of deposit or time deposits in banks which are insured by the federal deposit insurance corporation, if then in existence; or in short term discount obligations of the federal national mortgage association. Any such securities may be purchased at the offering or market price thereof at the time of such purchase. [I.C., § 70-2113, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — The Idaho bank act, referred to in this section, is compiled as § 26-101 et seq.

**70-2114. Bonds eligible for investment.** — The state of Idaho and all counties, cities, port districts and other municipal corporations, political subdivisions and public bodies, and public officers of any thereof, all banks, bankers, trust companies, savings banks and institutions, building and loan associations, savings and loan associations, investment companies, insurance companies and associations, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any revenue bonds issued pursuant to this act. [I.C., § 70-2114, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2115. Exemption from public buildings construction and bidding requirements.** — A project is not subject to any requirements relating to public buildings, structures, grounds, works, or improvements imposed by the Idaho Code, or any other similar requirements which may be lawfully waived by this section, and any requirement of competitive bidding or other restriction imposed on the procedure for award of contracts for such purpose or the lease, sale, or other disposition of property of any port district is not applicable to any action taken under authority of this act. [I.C., § 70-2115, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

**70-2116. Tax exemption.** — Any bonds issued under the provisions of this act, their transfer, and income therefrom, including any interest paid or payable thereon and profit made on the sale thereof, shall be exempt at all times from all taxation in the state of Idaho. [I.C., § 70-2116, as added by 1981, ch. 228, § 1, p. 457.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see compiler's notes, § 70-2101.

**70-2117. Severability.** — If any one or more sections or provisions of this act, or the application thereof to any person (including municipal corporations and political subdivisions) or circumstance, shall ever be held

by any court of competent jurisdiction to be invalid, the remaining provisions of this act and the application thereof to persons (including municipal corporations and political subdivisions) or circumstances other than those to which it is held to be invalid shall not be affected thereby, it being the intention of the legislature to enact the remaining provisions of this act notwithstanding such invalidity. [I.C., § 70-2117, as added by 1981, ch. 228, § 1, p. 457.]

### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 70-2101.

The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1981, ch. 228 declared an emergency. Approved April 6, 1981.

## CHAPTER 22

### COUNTY-BASED INTERMODAL COMMERCE AUTHORITY

#### SECTION.

70-2201. County-based intermodal commerce authority authorized.

70-2202. Purpose — Public and government functions.

70-2203. Establishment and abolishment.

70-2204. Commissioners.

70-2205. Cooperation of county.

70-2206. General powers of a county-based intermodal commerce authority.

#### SECTION.

70-2207. Rules, policies and orders.

70-2208. Supplementary powers.

70-2209. Granting of operation and use privileges.

70-2210. Property — Disposal.

70-2211. Bonds and obligations.

70-2212. Debt service fund.

70-2213. Federal, state and local money.

**70-2201. County-based intermodal commerce authority authorized.** — The county-based intermodal commerce authority, hereinafter referred to as the intermodal authority, is hereby authorized to acquire, construct, maintain, operate, develop and regulate rail, truck, and other on-land transfer and terminal facilities, buildings, warehouses and storage facilities, manufacturing, industrial and economic development facilities and services, reasonably incident to a modern, efficient and competitive land-based port, and may be established according to this chapter in any county. [I.C., § 70-2201, as added by 2004, ch. 353, § 1, p. 1053.]

### RESEARCH REFERENCES

**C.J.S.** — 15 C.J.S., Commerce, §§ 15, 145 et seq.

**70-2202. Purpose — Public and government functions.** — The purposes of a county-based intermodal authority are to:

(1) Promote, stimulate and advance the commerce, economic development, and prosperity of its jurisdiction and of the state;

(2) Endeavor to increase the volume of commerce within the jurisdiction of the county-based intermodal commerce authority through planning, advertising, acquisition, establishment, development, construction, improvement, maintenance, operation, regulation, and protection of transport-



tation, storage, and other facilities that promote economic handling of commerce;

(3) Cooperate and act in conjunction with other organizations, either public or private, in the development of commerce, industry, manufacturing, services, natural resources, agriculture, livestock, recreation, and other economic activity in the state; and

(4) Support the creation, expansion, modernization, retention, and relocation of new and existing businesses and industries, and assist in and support the growth of all kinds of economic activity that will tend to promote commerce and business development, maintain the economic stability and prosperity of its jurisdiction and of the state. [I.C., § 70-2202, as added by 2004, ch. 353, § 1, p. 1053.]

**70-2203. Establishment and abolishment.** — (1) There is hereby created in each county an independent public body, corporate and politic, to be known as a local county-based intermodal commerce authority.

(2) No intermodal commerce authority and no county shall exercise the authority hereafter conferred by this chapter until after the county commissioners, after a public hearing, have adopted a resolution finding that:

(a) There are conditions in the county which will be benefited by the intermodal commerce authority to further the purposes set forth in section 70-2202, Idaho Code; and

(b) The county commissioners have reason to believe that the citizens of the county are supportive of the intermodal commerce authority.

(3) Upon the county making the findings set forth in subsection (2) of this section, the intermodal commerce authority is authorized to transact the business and exercise the powers hereunder by a board of commissioners to be appointed or designated as provided in section 70-2204, Idaho Code.

(4) After the establishment of an intermodal authority, any county may by resolution or ordinance, after a public hearing, abolish the county-based intermodal commerce authority provided that the payment of any bonds or other obligations of the authority shall not be adversely affected by such action.

(5) Notwithstanding any other provision of this section to the contrary, any county-based intermodal authority existing as of July 1, 2006, is hereby validated. [I.C., § 70-2203, as added by 2004, ch. 353, § 1, p. 1053; am. 2005, ch. 364, § 1, p. 1152; am. 2006, ch. 75, § 1, p. 229.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 74, rewrote the section, which formerly read: “Any county, hereinafter referred to as a governing body, may, after a public hearing, by resolution or ordinance of its governing body, create an independent public body, corporate and politic, to be known as a local county-based intermodal commerce authority. Any county after establishment of an intermodal authority may, after a public hearing, by resolution or ordinance abolish the

county-based intermodal commerce authority. A county-based intermodal commerce authority shall be authorized to exercise its functions upon the appointment and qualification of the first commissioners thereof. The resolution or ordinance creating an authority shall include provisions for governance and how the authority shall conduct its affairs. The board of directors shall consist of no less than three (3) members.”

**Effective Dates.** — Section 2 of S.L. 2005,

ch. 364 declared an emergency. Approved April 12, 2005.

**70-2204. Commissioners.** — (1) The powers of each authority are vested in the commissioners thereof. The resolution or ordinance setting forth the findings as provided in section 70-2203(2), Idaho Code, shall create the authority and shall include provisions for appointing a board of not fewer than three (3) commissioners for the authority to staggered terms and requiring bylaws for governance of the authority. A majority of the commissioners of an authority constitutes a quorum for the purpose of conducting business of the authority and exercising its powers for all other purposes. Action may be taken by the intermodal authority upon a vote of not less than a majority of the commissioners present for a meeting of the authority.

(2) Each local county-based intermodal commerce authority must elect a chairman and vice-chairman from among the commissioners at a time and for terms as set out in the respective resolution or ordinance.

(3) An intermodal authority may employ such other officers, agents, and employees, permanent or temporary, as it may require. Commissioners shall determine necessary qualifications, duties and compensation for officers, agents and employees. An intermodal authority may delegate to one (1) or more of its agents or employees such powers or duties as it considers proper.

(4) A commissioner of an intermodal authority is entitled to receive reimbursement for expenses for travel and the discharge of his or her duties according to the policies of the governing body.

(5) For inefficiency or neglect of duty or misconduct in office, a commissioner may be removed only after a hearing and after such commissioner has been given a copy of the charges at least ten (10) days prior to such hearing and has had the opportunity to be heard in person or by counsel.

(6) Each commissioner shall hold office until his successor has been appointed and has qualified. A certificate of the appointment or reappointment of any commissioner shall be filed with the clerk of the county and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. [I.C., § 70-2204, as added by 2004, ch. 353, § 1, p. 1053; am. 2006, ch. 75, § 2, p. 229.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 75, in subsection (1), substituted “setting forth the findings as provided in section 70-2203(2), Idaho Code, shall create the authority and shall include provisions for appointing a board of not fewer than three (3) commissioners for the authority to staggered terms and requiring bylaws for governance of the authority” for “creating an authority shall

include provisions for establishing a commission to govern the affairs of the authority, to define what constitutes a quorum of the commission, terms of commissioners, procedures for appointment, reappointment, and vacancies” in the first sentence, and added “for a meeting of the authority” at the end of the last sentence; and added subsections (5) and (6).

**70-2205. Cooperation of county.** — (1) For the purpose of cooperating in the planning, establishment, construction or operation of an intermodal authority or any of its facilities, any governing body of the respective county for which an intermodal authority has been created may, upon such terms,

with or without consideration, as it may determine:

- (a) Dedicate, sell, convey or lease any of its interest in any property or facility or grant easements, licenses, or any other rights or privileges therein to the intermodal authority;
- (b) Cooperate with the intermodal authority in the planning of an intermodal authority and its facilities; and
- (c) Enter into agreements with the intermodal authority respecting action to be taken by the county pursuant to the provisions of this section.

(2) After a public hearing, any sale, conveyance, lease or agreement provided for in this section may be made by a public body. [I.C., § 70-2205, as added by 2004, ch. 353, § 1, p. 1053; am. 2006, ch. 75, § 3, p. 229.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 75, redesignated the paragraphs; inserted “upon such terms, with or without

consideration, as it may determine” at the end of the introductory paragraph of present subsection (1); and added present subsection (2).

**70-2206. General powers of a county-based intermodal commerce authority.** — An intermodal authority shall have the powers provided to it by a local governing body including:

(1) Have perpetual succession unless abolished as provided in this chapter;

(2) Sue and be sued;

(3) Have a seal;

(4) Execute contracts and other instruments and take other action that may be necessary or convenient to carry out the purposes of this chapter;

(5) Plan, establish, acquire, develop, construct, purchase, enlarge, improve, modify, maintain, equip, operate, regulate and protect transportation, storage, or other facilities or other personal property necessary or convenient to carry out the purposes of this chapter;

(6) Acquire any land or interest in land. All land and other property and privileges acquired and used by or on behalf of any intermodal authority must be used for intermodal authority purposes. The property of an intermodal authority acquired or held for the purposes of this chapter is declared to be public property used for essential public and governmental purposes and, effective the date an intermodal authority acquires title to such property, it shall be exempt from all taxes of the municipality, the county, the state or any political subdivision thereof; provided, that such tax exemption shall terminate when the authority sells or otherwise disposes of such property for development to a purchaser that is not a public body entitled to tax exemption with respect to such property. As specified in this chapter, a port authority may pledge, lease, sell, or mortgage all or any part of its facilities to secure bonds or for other financing purposes;

(7) Recommend to the county that created it, comprehensive county-based intermodal commerce authority zoning regulations in accordance with the laws of this state and the governing body; and

(8) Provide financial and other support to corporations or other business entities or organizations under the provisions of Idaho law, whose purpose



is to promote, stimulate, develop and advance the economic development and prosperity of its jurisdiction and of the state and its citizens by stimulating, assisting in, and supporting the growth of all kinds of economic activity, including the creation, expansion, modernization, retention, and relocation of new and existing businesses and industry in the state, all of which will tend to promote business development, maintain the economic stability and prosperity of the state, and thus provide maximum opportunities for employment and improvement in the standards of living of citizens of the state. [I.C., § 70-2206, as added by 2004, ch. 353, § 1, p. 1053; am. 2006, ch. 75, § 4, p. 229.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 75, in subsection (5), added the third sentence and “or for other financing purposes” at the end; and substituted “county” for “local governing body” in subsection (7).

**70-2207. Rules, policies and orders.** — An intermodal authority may adopt, amend, and repeal such reasonable rules, policies and orders as it considers necessary for its own administration, management, and governance as well as for the management, governance, and use of any transportation, storage, or other facility owned by it or under its control. No rule, policy, order or standard prescribed by the intermodal authority may be inconsistent with or contrary to any act of the congress of the United States or any law, rule, ordinance or resolution of the state of Idaho or the local governing body creating the intermodal authority. The intermodal authority shall keep on file at the principal office of the intermodal authority a copy of all its rules, policies and orders for public inspection. [I.C., § 70-2207, as added by 2004, ch. 353, § 1, p. 1053.]

**70-2208. Supplementary powers.** — In addition to the general and special powers conferred by this chapter, each intermodal authority may exercise all powers delegated to it by the governing body creating it and powers incidental to the exercise of such general and special powers contained herein. [I.C., § 70-2208, as added by 2004, ch. 353, § 1, p. 1053.]

**70-2209. Granting of operation and use privileges.** — In connection with the operation of transportation, storage, or other facilities owned or controlled by an intermodal authority, the intermodal authority may:

(1) Enter into contracts, leases, and other arrangements for terms not to exceed thirty (30) years:

(a) Granting the privilege of using or improving the intermodal authority facility or any portion or facility thereof or space therein for commercial purposes;

(b) Conferring the privilege of supplying goods, commodities, services or facilities at the intermodal authority facility; and

(c) Making available services to be furnished by the intermodal authority or its agents at the transportation, storage or other facility; and

(2) Establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which must be reasonable and uniform for the

same class of privilege or service and must be established with due regard to the property and improvements used and the expenses of operation to the authority. [I.C., § 70-2209, as added by 2004, ch. 353, § 1, p. 1053.]

**70-2210. Property — Disposal.** — (1) Except as may be limited by the terms and conditions of any grant, loan or agreement entered into by the intermodal authority, notwithstanding the provisions in title 31, Idaho Code, an intermodal authority may, after a public hearing, sell, lease with a provision containing the right to transfer title or otherwise dispose of any transportation, storage or other facility or other property or portion of or interest in the intermodal authority's facility or property acquired pursuant to this chapter.

(2) Notice of the public hearing shall be posted at least fourteen (14) days prior to the date of the hearing in at least one (1) conspicuous place in the county to be determined by the commissioners of the authority. A copy of such notice shall also be published in a daily or weekly newspaper published within such county in one (1) issue thereof at least fourteen (14) days prior to the date of the hearing. The place, hour and day of such hearing shall be specified in the notice. [I.C., § 70-2210, as added by 2004, ch. 353, § 1, p. 1053; am. 2006, ch. 75, § 5, p. 229.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 75, added the subsection (1) designation; in subsection (1), substituted “notwithstanding the provisions in title 31, Idaho Code, an intermodal authority may, after a public hearing, sell, lease with a provision containing the right to transfer title” for “an intermodal authority may sell, lease” in the first sentence, and deleted the last sentence,

which formerly read: “The disposal by sale, lease, or otherwise must be in accordance with the laws of this state and the governing body governing the disposition of other public property, unless a sale, lease, mortgage or other disposition is made under this chapter to secure bonds of the intermodal authority”; and added subsection (2).

**70-2211. Bonds and obligations.** — (1) An intermodal authority may borrow money for any of its lawful purposes and shall have the power to issue bonds from time to time in its discretion to finance the undertaking of any project or purpose under this chapter. Bonds shall be payable out of any revenue of the intermodal authority, including revenue derived from:

- (a) Any transportation, storage or other facility;
- (b) Grants or appropriations from federal, state or local governments; or
- (c) Other sources.

(2) The bonds may be issued by resolution of the intermodal authority without any limitation of amount, except that bonds may not be issued at any time if the total amount of principal and interest to become due in any year on the bonds and on any then outstanding bonds for which revenue from the same source is pledged exceeds the amount of revenue to be received in that year, as estimated in the intermodal authority order authorizing the issuance of the bonds. The intermodal authority shall take all action necessary and possible to impose, maintain, and collect rates, charges and rentals sufficient to make the revenue from the pledged source



in such year at least equal to the amount of principal and interest due in that year.

(3) The bonds may be sold at public or private sale and shall bear interest at such rate or rates as the issuing intermodal authority respectively shall determine. Except as otherwise provided in this chapter, any bonds issued pursuant to this chapter by an intermodal authority shall be payable as to principal and interest solely from revenue of the intermodal authority or from particular transportation, storage or other facilities of the intermodal authority. The bonds must state on their face the applicable limitations or restrictions regarding the source from which principal and interest are payable. In no circumstance shall the bonds be payable with a property tax.

(4) Bonds issued by an intermodal authority pursuant to the provisions of this chapter are declared to be issued for an essential public and governmental purpose and together with interest thereon and income therefrom, shall be exempted from all state and local taxes.

(5) For the security of bonds, the intermodal authority may by resolution make and enter into any covenant, agreement or indenture and may exercise any additional powers authorized by a county. The sums required from time to time to pay principal and interest and to create and maintain a reserve for the bonds may be paid from any revenue referred to in this chapter, prior to the payment of current costs of operation and maintenance of the facilities. As further security for the bonds, the intermodal authority, with the approval of the governing body of the county that created the authority, may pledge, lease, sell, mortgage, or grant a security interest in all or any portion of its land-based port, transportation, storage or other facilities, whether or not the facilities are financed by the bonds. The instrument effecting the pledge, lease, sale, mortgage, or security interest may contain any agreements and provisions customarily contained in instruments securing bonds, as the commissioners of the intermodal authority consider advisable. The provisions must be consistent with this chapter and are subject to and must be in accordance with the laws of this state governing mortgages, trust indentures, security agreements, or instruments. The instrument may provide that in the event of a default in the payment of principal or interest on the bonds or in the performance of any agreement contained in the proceedings authorizing the bonds or instrument, the payment or performance may be enforced by the appointment of a receiver in equity. The receiver may collect charges, rents or fees and may apply the revenue from the mortgaged property or collateral in accordance with the provisions of the instrument.

(6) Nothing in this section may be construed to limit the use of intermodal authority revenue, including federal, state and local money to make grants and loans or to otherwise provide financial and other support to a private intermodal authority, including corporations and business entities operating under the provisions of Idaho law. The credit of the state, county or municipal governments or their agencies or authorities may not be pledged to provide financial support to the intermodal authority. [I.C., § 70-2211, as added by 2004, ch. 353, § 1, p. 1053; am. 2006, ch. 75, § 6, p. 229.]



## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 75, rewrote the introductory language of subsection (1), which read: “Except for providing financial support to a private organization, including a business operating under Idaho law, whose purpose is to advance the economic development of its jurisdiction and of the state and its citizens, an intermodal authority may borrow money for any of its lawful purposes. For the purposes of sections 3 and 3B, article VIII of the constitution of the state of Idaho, the local intermodal authority shall be deemed and considered to be a port district. The bonds may be issued

according to processes and in the form and upon terms as it determines pursuant to section 3B, article VIII of the constitution of the state of Idaho. Bonds shall be payable out of any revenue of the intermodal authority, including revenue derived from”; deleted “pursuant to section 3B, article VIII of the constitution of the state of Idaho” following “intermodal authority” in the first sentence of subsection (2); and added “and together with interest thereon and income therefrom, shall be exempted from all state and local taxes” at the end of subsection (4).

**70-2212. Debt service fund.** — An intermodal authority may create a debt service fund and accumulate therein a sum determined by the governing body, together with interest thereon, for the use, repairs, maintenance, and capital outlays of a county-based intermodal commerce authority. [I.C., § 70-2212, as added by 2004, ch. 353, § 1, p. 1053.]

**70-2213. Federal, state and local money.** — An intermodal authority may accept, receive, receipt for, and spend federal, state and local money and other public or private money made available by grant, loan or appropriation to accomplish any of the purposes of this chapter and according to conditions of the grant, loan or appropriation. All federal money accepted under this section must be accepted and spent by the authority upon terms and conditions prescribed by the United States and consistent with state law. All state money accepted under this section must be accepted and spent by the intermodal authority upon terms and conditions prescribed by the state. All county money accepted under this section must be accepted and spent by the intermodal authority upon terms and conditions prescribed by the governing county. [I.C., § 70-2213, as added by 2004, ch. 353, § 1, p. 1053.]



# TITLE 71

## WEIGHTS AND MEASURES

### CHAPTER.

1. DIVISION OF WEIGHTS AND MEASURES, §§ 71-101 — 71-121.
2. STANDARDS, §§ 71-201 — 71-243.
3. ENFORCEMENT AND PENALTIES, §§ 71-301 — 71-308.

### CHAPTER.

4. LICENSING OF WEIGHMASTERS, §§ 71-401 — 71-411.

## CHAPTER 1

### DIVISION OF WEIGHTS AND MEASURES

#### SECTION.

- 71-101 — 71-107. [Repealed.]  
71-108. Definitions.  
71-109. Bureau of weights and measures.  
71-110. Duties of director.  
71-111. Regulations for enforcement.  
71-112. Testing weights and measures used in public institutions.  
71-113. Inspection and testing of commercially-used weights and measures.  
71-114. Investigation of complaints of and possible violations of act.  
71-115. Verification of weight or measure of contents of packages — Sampling procedure — Tagging

#### SECTION.

- non-complying packages —  
Sale of tagged packages prohibited.  
71-116. Enforcement orders.  
71-117. Sealing or marking correct weights and measures.  
71-118. Seizure of weights, measures or packages for evidence.  
71-119. Rejected weights and measures — Correction or disposal.  
71-120. Service for federal government — Testing and weighing or measuring apparatus.  
71-121. Rules — Fees — Weights and measures inspection fund.

### 71-101 — 71-107. Powers and duties of Department of Agriculture — Weights and measures. [Repealed.]

## STATUTORY NOTES

**Compiler's Notes.** — These sections, comprising 1905, p. 364, §§ 1, 2; 1907, p. 340, § 1; R.C., §§ 1541, 1542; 1913, ch. 84, §§ 17-21 (1st part), 23, p. 341; C.L., §§ 109:2-109:7; C.S., §§ 2555-2560; I.C.A., §§ 69-101 — 69-

106; 1927, ch. 86, § 1, p. 104; 1931, ch. 141, § 1, p. 238; 1941, ch. 52, § 1, p. 110; 1947, ch. 67, § 1, p. 108; 1961, ch. 77, § 1, p. 104, were repealed by S.L. 1969, ch. 43, § 36.

### 71-108. Definitions. — When used in this act:

(1) The word "person" shall be construed to mean both the plural and singular, as the case demands, and shall include individuals, partnerships, corporations, companies, societies, and associations.

(2) The words "weight(s) and (or) measure(s)" shall be construed to mean all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliances and accessories associated with any or all such instruments and devices, except that the term shall not be construed to include meters for the measurement of electricity, gas (natural or manufactured), or water when the same are operated in a public utility system. Such electricity, gas, and water meters are hereby specifically excluded from the purview of this act, and none of the provisions of this act



shall be construed to apply to such meters or to any appliances or accessories associated therewith.

(3) The word “net” shall be construed to mean clear of, or excluding all tare, wrappers and other material packed with a commodity or in which a commodity is contained.

(4) The word “weight” as used in this act in connection with any commodity shall mean net weight. Whenever any commodity is sold on the basis of weight, the net weight of the commodity shall be employed, and all contracts concerning commodities shall be so construed.

(5) The words “sell” and “sale” shall be construed to mean barter and exchange.

(6) The term “director” shall be construed to mean, respectively, (the state) the director of the department of agriculture or his duly authorized employees.

(7) The term “inspector” shall be construed to mean a state inspector of weights and measures.

(8) The term “intrastate commerce” shall be construed to mean any and all commerce or trade within the limits of the state of Idaho, and the phrase “introduced into intrastate commerce” shall be construed to define the time and place at which the first sale and delivery of a commodity is made within the state, the delivery being made either directly to the purchaser or to a common carrier for shipment to the purchaser.

(9) The term “commodity in package form” shall be construed to mean commodity put up or packaged in any manner in advance of sale in units suitable for either wholesale or retail sale, exclusive, however, of any auxiliary shipping container inclosing packages that individually conform to the requirements of this act. An individual item or lot of any commodity not in package form as defined in this section, but on which there is marked a selling price based on an established price per unit of weight or of measure, shall be construed to be commodity in package form.

(10) A “consumer package” or “package of consumer commodity” shall be construed to mean a commodity in package form that is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals for the purpose of personal care or use by individuals or in the performance of services ordinarily rendered in or about the household or in connection with personal possessions.

(11) A “nonconsumer package” or “package of nonconsumer commodity” shall be construed to mean any commodity in package form other than a consumer package, and particularly a package designed solely for industrial or institutional use or for wholesale distribution only.

(12) For the purposes of this act, apparatus shall be deemed to be “correct” when it conforms to all applicable requirements promulgated by the national bureau of standards or its successor organization, the national institute of standards and technology, or by regulation passed by the director. Other apparatus shall be deemed to be “incorrect.” [1969, ch. 43, § 1, p. 108; am. 1974, ch. 18, § 236, p. 364; am. 1990, ch. 37, § 1, p. 55.]

### STATUTORY NOTES

**Compiler's Notes.** — The words “the state” in subdivision (6) were placed in parentheses by the compiler as surplusage.

The words “this act” refer to S.L. 1969, ch. 43, compiled as §§ 71-108 — 71-120, 71-229 — 71-243, 71-303 — 71-308.

**71-109. Bureau of weights and measures.** — Within the department of agriculture there shall be a bureau of weights and measures. The director of the department of agriculture shall be the director of weights and measures. He shall appoint an inspection staff of weights and measures inspectors and necessary supervisory, technical and clerical personnel. [1969, ch. 43, § 5, p. 108; am. 1974, ch. 18, § 237, p. 364.]

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, *Weights and Measures*, § 3 et seq.

**C.J.S.** — 94 C.J.S., *Weights and Measures*, § 3 et seq.

**71-110. Duties of director.** — The director shall have the custody of the state standards of weight and measure and of the other standards and equipment provided for by this act, and shall together with the supervisory personnel and the inspectors enforce the provisions of this act and shall keep accurate records of the same. He shall have and keep general supervision over the weights and measures offered for sale, sold, or in use commercially in this state. The director shall report to the governor's office when and as he is required to do so. [1969, ch. 43, § 6, p. 108.]

### STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's notes, § 71-108.

**71-111. Regulations for enforcement.** — The director shall issue regulations for the enforcement of this act, which regulations shall have the force and effect of law. The specifications, tolerances, and other technical requirements for commercial weighing and measuring devices, together with amendments thereto of the national conference on weights and measures recommended and published by national bureau of standards or its successor organization, the national institute of standards and technology, from time to time, shall be considered by the director in establishing such regulations and said regulations shall conform as nearly as possible to those recommended by the national bureau of standards or its successor organization, the national institute of standards and technology. The director may by regulations exempt apparatus from any or all of the requirements of this act. [1969, ch. 43, § 7, p. 108; am. 1990, ch. 37, § 2, p. 55.]

### STATUTORY NOTES

**Compiler's Notes.** — For words “this act” see Compiler's notes, § 71-108.

**71-112. Testing weights and measures used in public institutions.**

— The director shall from time to time, test all weights and measures used in checking the receipt or disbursement of supplies in every institution for the maintenance of which moneys are appropriated by the legislature, report his findings, in writing, to the supervisory board or to the executive officer of the institution concerned. [1969, ch. 43, § 8, p. 108.]

**71-113. Inspection and testing of commercially-used weights and measures.**

— The director shall have the power to inspect and test, to ascertain if they are correct, all weights and measures commercially used, kept, offered, or exposed for sale, and to determine the weight, measurement, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure or of count. The inspection, testing, and determinations here provided for shall be done under a schedule to be drawn up by the director. [1969, ch. 43, § 9, p. 108.]

**71-114. Investigation of complaints of and possible violations of act.**

— The director shall investigate complaints made to him concerning violations of the provisions of this act, and shall, upon his own initiative, conduct such investigations as he deems appropriate and advisable to develop information on prevailing procedures in commercial quantity determinations and on possible violations of the provisions of this act, and shall have the power to subpoena witnesses or take depositions, throughout the state, in relation to investigations or any hearings held by him under this act. [1969, ch. 43, § 10, p. 108.]

**STATUTORY NOTES**

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-108.

**71-115. Verification of weight or measure of contents of packages****— Sampling procedure — Tagging non-complying packages — Sale of tagged packages prohibited.**

— The director shall, from time to time, weigh or measure and inspect packages or amounts of commodities kept, offered, or exposed for sale, sold, or in the process of delivery, to determine whether the same contain the amounts represented and whether they be kept, offered, or exposed for sale or sold in accordance with law. When such packages or amounts of commodities are found not to contain the amounts represented, or are found to be kept, offered, or exposed for sale in violation of the law, the director may order them off sale and may so mark or tag them as to show them to be illegal. In carrying out the provisions of this act, the director may employ recognized sampling procedures under which the compliance of a given lot of packages will be determined on the basis of the result obtained on a sample selected from and representative of such lot. No person shall (1) sell, or keep, offer, or expose for sale, in intrastate commerce, any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section unless and until such package or amount of commodity has been brought into full compliance with



all legal requirements, or (2) dispose of any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section and that has not been brought into compliance with legal requirements, in any manner, except with the specific approval of the director. [1969, ch. 43, § 11, p. 108.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-108.

**71-116. Enforcement orders.** — The director shall have the power to issue stop-use orders, stop-removal orders, and removal orders with respect to weights and measures being, or susceptible of being, commercially used, and to issue stop-removal orders and removal orders with respect to packages or amounts of commodities kept, offered, or exposed for sale, sold, or in process of delivery, whenever in the course of his enforcement of the provisions of this act he deems it necessary or expedient to issue such orders, and no person shall use, remove from the premises specified, or fail to remove from the premises specified, any weight, measure, or package or amount of commodity contrary to the terms of a stop-use order, stop-removal order, or removal order issued under the authority of this section. [1969, ch. 43, § 12, p. 108.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-108.

**71-117. Sealing or marking correct weights and measures.** — The director shall approve for use, and seal or mark with appropriate devices, such weights and measures as he finds upon inspection and test to be "correct" as defined in section 71-108, paragraph 12, and shall reject and mark or tag as "rejected" such weights and measures as he finds, upon inspection or test, to be "incorrect" as defined in section 71-108, paragraph 12, but which in his best judgment are susceptible of satisfactory repair: provided, that such sealing or marking shall not be required with respect to such weights and measures as may be exempted therefrom by a regulation of the director issued under the authority of section 71-111. The director shall condemn, and may seize and destroy, weights and measures found to be incorrect that, in his best judgment, are not susceptible of satisfactory repair, as provided for in section 71-308. Weights and measures that have been rejected may be confiscated and may be destroyed by the director if not corrected as required by section 71-119, or if used or disposed of contrary to the requirements of section 71-119, as provided for in section 71-308. [1969, ch. 43, § 13, p. 108.]

**71-118. Seizure of weights, measures or packages for evidence.** — With respect to the enforcement of this act and any other acts dealing with weights and measures that he is or may be empowered to enforce, the

director is hereby authorized to seize for use as evidence, without formal warrant, incorrect or unsealed weights and measures or amounts or packages of a commodity found to be used, retained, offered, or exposed for sale or sold in violation of law. In the performance of his official duties, the director is authorized to enter and go into or upon, without formal warrant, any structure or premises and to stop any person whatsoever and to require him to proceed, with or without any vehicle of which he may be in charge, to some place which the director may specify. [1969, ch. 43, § 14, p. 108.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-108.

#### **71-119. Rejected weights and measures — Correction or disposal.**

— Weights and measures that have been rejected under the authority of the director or of an inspector shall remain subject to the control of the rejecting authority until such time as suitable repair or disposition thereof has been made as required by this section. The owners of such rejected weights and measures shall cause the same to be made correct within thirty (30) days or such longer period as may be authorized by the rejecting authority; or, in lieu of this, may dispose of the same, but only in such manner as is specifically authorized by the rejecting authority. Weights and measures that have been rejected shall not again be used commercially until they have been officially re-examined and found to be correct, or until specific written permission for such use is issued by the rejecting authority, or until the rejection tag has been removed and the rejected device repaired and placed in service by a person duly registered to perform such acts under a regulation issued by the director for the registration of weights and measures, servicemen and service agencies. [1969, ch. 43, § 15, p. 108.]

#### STATUTORY NOTES

**Compiler's Notes.** — Section 16 of S.L. 1969, ch. 43 is compiled as § 71-232.

#### **71-120. Service for federal government — Testing and weighing or measuring apparatus.**

— (1) The director on behalf of the bureau of weights and measures may with the approval of the governor contract to perform services similar to those provided for by this act for any agency or subdivision of the federal government and may receive on behalf of the bureau of weights and measures funds from any such division or agency of the federal government to cover the expenses incurred in performing such services.

(2) At the request of any person, the director may inspect, test and seal weighing or measuring apparatus in addition to the testing required by law. Any person making such special request shall pay the bureau the necessary expenses incurred by it in making inspections and tests. [1969, ch. 43, § 34, p. 108; am. 1974, ch. 18, § 238, p. 364.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-108.

**Effective Dates.** — Section 263 of S.L.

1974, ch. 18 provided this act take effect on and after July 1, 1974.

**71-121. Rules — Fees — Weights and measures inspection fund.**  
— The director shall have the authority to promulgate rules to establish fees for the licensing of weighing and measuring devices to compensate the state for the expense of administering weights and measures laws. The director shall collect a reasonable fee not to exceed the actual cost to the state of administering such laws. Fees shall be deposited with the state treasurer and shall be credited to the weights and measures inspection fund, which is hereby created and established. Moneys in the weights and measures inspection fund shall be invested as provided in section 67-1210, Idaho Code, and interest earned on investment of idle moneys in the fund shall be paid to the fund. Moneys in the fund shall be used solely for carrying out the provisions of title 71, Idaho Code, and may be expended only pursuant to legislative appropriation. [I.C., § 71-121, as added by 2003, ch. 355, § 3, p. 947.]

## CHAPTER 2

## STANDARDS

## SECTION.

71-201 — 71-228. [Repealed.]

71-229. United States and metric systems jointly recognized.

71-230. "Barrel," "ton" and "cord" defined.

71-231. Certification of state standards — Field standards.

71-232. Sale of commodities by weight or measure — Exceptions.

71-233. Packaged commodities — Label required — Contents.

71-234. Misrepresentation of price prohibited — Fractions of cents.

71-235. Sale of meat, poultry and seafood by weight required — Exceptions.

## SECTION.

71-236. Sizes of loaves of bread permitted.

71-237. Butter, oleomargarine, margarine, butter-like and margarine-like spreads.

71-238. Fluid dairy and milk products.

71-239. Flour, hominy grits and corn meal.

71-240. Delivery in bulk — Duplicate delivery ticket showing weight.

71-241. Petroleum products — How sold — Measurement.

71-242. Berries and small fruit — How sold.

71-243. Fractional parts of units of weight or measure.

**71-201 — 71-216. State standards — Liquid, non-liquid, electrical measures — Stone masonry, cord, dry commodities — Apples, berries, milk and lard. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — These sections, comprising 1883, p. 65, § 1; R.S., § 1251; 1905, p. 364, §§ 1, 3 (last sentence); R.C., §§ 1542, 1543 (last sentence), 1545; 1913, ch. 84, §§ 1-

13; C.L. 109:8-109:23; C.S., §§ 2561-2576; 1921, ch. 167, § 1, p. 362; I.C.A., §§ 69-201 — 69-216, were repealed by S.L. 1969, ch. 43, § 36.



**71-217. Standard bread loaf. [Repealed.]****STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised S.L. 1913, ch. 84, § 14, p. 341; C.L. 109:24; C.S., § 2577; I.C.A., § 69-217; 1949, ch. 125, § 1, p. 221, was repealed by S.L. 1957, ch. 121, § 7, p. 201.

**71-218 — 71-228. Butter — Sale and delivery — Certain grain containers — Bread weights — Loaf sizes — Penalties. [Repealed.]****STATUTORY NOTES**

**Compiler's Notes.** — These sections, comprising 1913, ch. 84, §§ 15, 16; C.L. 109:25, 109:26; C.S., §§ 2578, 2579; I.C.A., §§ 69-218, 69-219; 1945, ch. 98, §§ 1, 2, p. 147; 1947, ch. 4, § 1, p. 6; 1957, ch. 84, § 1, p. 135; 1957, ch. 121, §§ 1-6, p. 201; 1961, ch. 77, § 2, p. 104, were repealed by S.L. 1969, ch. 43, § 36.

**71-229. United States and metric systems jointly recognized. —** The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized, and either one (1) or both of these systems shall be used for all commercial purposes in the state of Idaho. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the national bureau of standards or its successor organization, the national institute of standards and technology, are recognized and shall govern weighing and measuring equipment and transactions in the state. [1969, ch. 43, § 2, p. 108; am. 1990, ch. 37, § 3, p. 55.]

**STATUTORY NOTES**

**Federal References.** — For the federal law governing weights and measures, see 15 U.S.C. § 201 et seq.

**71-230. “Barrel,” “ton” and “cord” defined. —** The term “barrel” when used in connection with fermented liquor shall mean a unit of thirty-one (31) gallons. The term “ton” shall mean a unit of two thousand (2,000) pounds avoirdupois weight. The term “cord” when used in connection with wood intended for fuel purposes shall mean the amount of wood that is contained in a space of one hundred twenty-eight (128) cubic feet when the wood is ranked and well stowed. [1969, ch. 43, § 3, p. 108.]

**71-231. Certification of state standards — Field standards. —** The weights and measures of the state used as state standards shall, when they have been certified as being satisfactory for use by the national bureau of standards or its successor organization, the national institute of standards and technology, be the state standards of weight and measure and they shall be maintained in such calibration as prescribed by the national institute of standards and technology. There shall also be “field standards” and such

equipment as may be found necessary to carry out the provisions of this act. Said field standards shall be tested by the bureau each year. [1969, ch. 43, § 4, p. 108; am. 1974, ch. 18, § 239, p. 364; am. 1990, ch. 37, § 4, p. 55; am. 1991, ch. 32, § 1, p. 70.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words “this act” 108 — 71-120, 71-229 — 71-243, 71-303 — refer to S.L. 1969, ch. 43, compiled as §§ 71- 71-308.

#### **71-232. Sale of commodities by weight or measure — Exceptions.**

— Commodities in liquid form shall be sold only by liquid measure or by weight, and, except as otherwise provided in this act, commodities not in liquid form shall be sold only by weight, by measure of length or area, or by count; provided, that liquid commodities may be sold by weight and commodities not in liquid form may be sold by count only if such methods give accurate information as to the quantity of commodity sold: and provided further, that the provisions of this section shall not apply (1) to commodities when sold for immediate consumption on the premises where sold, (2) to vegetables when sold by the head or bunch, (3) to commodities in containers standardized by a law of this state or by federal law, (4) to commodities in package form when there exists a general consumer usage to express the quality in some other manner, (5) to concrete aggregates, concrete mixtures, and loose solid materials such as earth, soil, gravel, crushed stone, and the like, when sold by cubic measure, or (6) to unprocessed vegetable and animal fertilizer when sold by cubic measure. The director may issue such reasonable regulations as are necessary to assure that amounts of commodity sold are determined in accordance with good commercial practice and are so determined and represented as to be accurate and informative to all parties at interest. [1969, ch. 43, § 16, p. 108.]

#### STATUTORY NOTES

**Compiler's Notes.** — For the words “this act” see Compiler's notes, § 71-231.

#### **71-233. Packaged commodities — Label required — Contents. —**

Any packaged commodity, introduced or received into intrastate commerce or kept, offered or exposed for sale shall bear on the outside of the package declarations of: (1) the identity of the commodity in the package, (2) the net quantity of the contents in terms of weight, measure or count, and (3) where the package is not sold where packed the name and place of business of the manufacturer, packer or distributor. The director may by regulation provide for use and/or methods of labeling, qualifying terms, reasonable variations, exceptions, exemptions, declarations of price, random packages, misleading packages, standards of net weight, measure or count and standards of fill, and advertising. In adopting such regulations the director may consider the appropriate federal packaging and labeling laws and regulations and all

commodities packaged in compliance with such federal laws and regulations. [1969, ch. 43, § 17, p. 108.]

**71-234. Misrepresentation of price prohibited — Fractions of cents.** — Whenever any commodity or service is sold, or is offered, exposed, or advertised for sale, by weight, measure, or count, the price shall not be misrepresented, nor shall the price be represented in any manner calculated or tending to mislead or deceive an actual or prospective purchaser. Whenever an advertised, posted, or labeled price per unit of weight, measure, or count includes a fraction of a cent, all elements of the fraction shall be prominently displayed and the numeral or numerals expressing the fraction shall be immediately adjacent to, of the same general design and style as, and at least one-half ( $\frac{1}{2}$ ) the height and width of the numerals representing the whole cents. [1969, ch. 43, § 18, p. 108.]

**71-235. Sale of meat, poultry and seafood by weight required — Exceptions.** — Except for immediate consumption on the premises where sold, or as one (1) of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat products, poultry (whole or parts), and all seafood except shellfish, offered or exposed for sale or sold as food shall be offered or exposed for sale and sold by weight. When meat, poultry or seafood is combined with or associated with some other food product or a food combination, such food product or combination shall be offered or exposed for sale and sold by weight, and the quantity representation may be the total weight of the product of combination, and a quantity representation need not be made for each of the several elements of the product or combination. [1969, ch. 43, § 19, p. 108.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**71-236. Sizes of loaves of bread permitted.** — Each loaf of bread kept, offered, or exposed for sale, or sold, whether or not the bread is packaged or sliced, shall be sold by weight unless specifically exempted by rules promulgated by the director. [1969, ch. 43, § 20, p. 108; am. 1998, ch. 134, § 1, p. 491.]

**71-237. Butter, oleomargarine, margarine, butter-like and margarine-like spreads.** — Butter, oleomargarine, margarine, butter-like and margarine-like spreads shall be offered and exposed for sale and sold by weight. Butter-like and margarine-like spreads are those products that meet the federal standard of identity for butter or margarine and oleomargarine except that they contain less than eighty percent (80%) fat and may contain other safe and suitable ingredients. [1969, ch. 43, § 21, p. 108; am. 1991, ch. 33, § 1, p. 70; am. 1998, ch. 134, § 2, p. 491.]



**71-238. Fluid dairy and milk products.** — All fluid dairy and milk products including, but not limited to, whole milk, skimmed milk, cultured milk, sweet cream, sour cream, and buttermilk, shall be sold in units of fluid volume. [1969, ch. 43, § 22, p. 108; am. 1975, ch. 231, § 1, p. 634; am. 1998, ch. 134, § 3, p. 491.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1975, ch. 13 declared an emergency. Approved March 28, 1975.

**71-239. Flour, hominy grits and corn meal.** — When in package form and when packed, kept, offered, or exposed for sale or sold, wheat flour, whole wheat flour, graham flour, self-rising wheat flour, phosphated wheat flour, bromated flour, enriched flour and enriched self-rising flour, enriched bromated flour, corn flour, corn meal, and hominy grits, whether enriched or not, shall be sold by weight. [1969, ch. 43, § 23, p. 108; am. 1998, ch. 134, § 4, p. 491.]

**71-240. Delivery in bulk — Duplicate delivery ticket showing weight.** — When a vehicle delivers to an individual purchaser a commodity in bulk, and the commodity is sold in terms of weight units, the delivery shall be accompanied by a duplicate delivery ticket with the following information clearly stated, in ink or by means of other indelible marking equipment and, in clarity, equal to type or printing, (1) the name and address of the vendor, (2) the name and address of the purchaser, and (3) the net weight of the delivery expressed in pounds, and, if the net weight is derived from determinations of gross and tare weights, such gross and tare weights also shall be stated in terms of pounds. One (1) of these tickets shall be retained by the vendor, and the other shall be delivered to the purchaser at the time of delivery of the commodity, or shall be surrendered, on demand, to the director, or the bureau chief or the inspector, who, if he desires to retain it as evidence, shall issue a weight slip in lieu thereof for delivery to the purchaser; provided, that, if the purchaser, himself, carries away his purchase, the vendor shall be required only to give to the purchaser at the time of sale a delivery ticket stating the number of pounds of commodity delivered to him. [1969, ch. 43, § 24, p. 108; am. 1974, ch. 18, § 240, p. 364.]

#### STATUTORY NOTES

**Effective Dates.** — Section 263 of S.L. 1974, ch. 18 provided this act take effect on and after July 1, 1974.

**71-241. Petroleum products — How sold — Measurement.** — (1) All petroleum products shall be sold by liquid measure or by net weight in accordance with the provisions of section 71-232, Idaho Code, and in accordance with regulations to be made by the director.

(2) Sellers of motor fuel within this state shall offer to prospective purchasers the option to buy the product either by gross gallons or on the

assumption that the temperature of the product is sixty degrees (60°) fahrenheit or the centigrade equivalent. This purchaser option may be exercised only on an annual basis and applied only to single deliveries of eight thousand (8,000) gallons or more or the metric equivalent. Any adjustments to volumes during the temperature compensation process shall be made in accordance with the standards set by the American society of testing materials.

(3) The department of agriculture may purchase and use measuring devices for monitoring bulk deliveries.

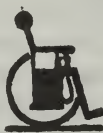
(4) Any retail outlet offering self-dispensed motor fuels only shall, upon request of the disabled driver, provide assistance in delivering fuel into the tank of a vehicle displaying a handicapped license or card, but this requirement shall not apply when such vehicle carries an able-bodied adult or if only one (1) attendant is on duty at the retail outlet. Disabled individuals receiving this refueling service at a self-service pump shall not be charged more than the self-service price for the fuel. Notice of the availability of this service shall be posted pursuant to the provisions of subsection (5)(b) of this section. A violation of the provisions of this subsection shall be an infraction.

(5) Any retail outlet offering both attendant-dispensed motor fuels and self-dispensed motor fuels will, during those hours that attendant-dispensed motor fuels are available, provide attendant-dispensed motor fuels at the same price as for self-dispensed motor fuels when such fuel is delivered at the self-service pump into the fuel tank of a vehicle displaying a handicapped license or card, but this requirement shall not apply when such vehicle carries an able-bodied adult.

(a) Notification of the provisions of subsections (4) and (5) of this section shall be provided, by the Idaho transportation department, to all operators of facilities offering gasoline or other motor vehicle fuels for sale, and to every person who is issued a handicapped or a disabled veterans registration plate, or other authorized designation.

(b) The following notice shall be provided by the Idaho transportation department and posted in a manner and location which is visible to any driver seeking refueling service. The notice shall be a placard in substantially the following format, printed in black except that the international accessible symbol shall be printed in blue.

**WHEN THERE ARE TWO OR MORE  
EMPLOYEES ON DUTY  
THIS STATION WILL**



**PUMP YOUR GAS  
Idaho Code Section 71-241**

[1969, ch. 43, § 25, p. 108; am. 1981, ch. 337, § 1, p. 701; am. 1990, ch. 297, § 1, p. 818; am. 1999, ch. 135, § 1, p. 381.]

**71-242. Berries and small fruit — How sold.** — Berries and small fruits shall be offered and exposed for sale and sold by weight, or by measure in open containers having capacities of one-half ( $\frac{1}{2}$ ) dry pint, one (1) dry pint, or one (1) dry quart. [1969, ch. 43, § 26, p. 108.]

**71-243. Fractional parts of units of weight or measure.** — Fractional parts of any unit of weight or measure shall mean like fractional parts of the value of such unit as prescribed or defined in sections 71-229, 71-230, and all contracts concerning the sale of commodities and services shall be construed in accordance with this requirement. [1969, ch. 43, § 27, p. 108.]

## CHAPTER 3

### ENFORCEMENT AND PENALTIES

#### SECTION.

71-301, 71-302. [Repealed.]

71-303. Interfering with officers — Penalty.

71-304. Impersonation of officers — Penalty.

71-305. Acts constituting misdemeanors — Penalties.

#### SECTION.

71-306. Injunctions — Impounding of commodities.

71-307. Presumptive proof of use of weight or measure.

71-308. Review of orders — Appeal.

**71-301, 71-302. Interference with inspection — Using false weights and measures. [Repealed.]**

### STATUTORY NOTES

**Compiler's Notes.** — These sections, comprising 1905, p. 364, § 4; 1913, ch. 84, §§ 21 (last part), 22, p. 341; R.C., § 1544; C.L.,

109:27, 109:28; C.S., §§ 2580, 2581; I.C.A., §§ 69-301, 69-302, were repealed by S.L. 1969, ch. 43, § 36.

**71-303. Interfering with officers — Penalty.** — Any person who shall hinder or obstruct in any way the director, administrator or bureau chief, or any of the inspectors, in the performance of his official duties shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty dollars (\$20.00) or more than two hundred dollars (\$200), or by imprisonment for not more than three (3) months, or by both such fine and imprisonment. [1969, ch. 43, § 28, p. 108; am. 1974, ch. 18, § 241, p. 364.]

### RESEARCH REFERENCES

**Am. Jur.** — 79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

**71-304. Impersonation of officers — Penalty.** — Any person who shall impersonate in any way the director, the administrator or bureau chief, or any one (1) of the inspectors, by the use of his seal or a counterfeit of his seal, or in any other manner, shall be guilty of a misdemeanor, and



upon conviction thereof shall be punished by a fine of not less than one hundred dollars (\$100) or more than five hundred dollars (\$500), or by imprisonment for not more than one (1) year, or by both such fine and imprisonment. [1969, ch. 43, § 29, p. 108; am. 1974, ch. 18, § 242, p. 364.]

#### STATUTORY NOTES

**Effective Dates.** — Section 263 of S.L. 1974, ch. 18 provided this act take effect on and after July 1, 1974.

**71-305. Acts constituting misdemeanors — Penalties.** — Any person who, by himself, or by his servant or agent, or as the servant or agent of another person, performs any one (1) of the acts enumerated in subparagraphs (1) through (9) of this section shall be guilty of a misdemeanor and, upon first conviction thereof, shall be punished by a fine of not less than twenty dollars (\$20.00) or more than two hundred dollars (\$200) or by imprisonment for not more than three (3) months, or by both such fine and imprisonment. Upon a second or subsequent conviction thereof, he shall be punished by a fine of not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500), or by imprisonment for not more than one (1) year, or by both such fine and imprisonment.

(1) Use or have in possession for the purpose of using for any commercial purpose specified in section 71-113, sell, offer, or expose for sale or hire, or have in possession for the purpose of selling or hiring, an incorrect weight or measure or any device or instrument used to or calculated to falsify any weight or measure.

(2) Use, or have in possession for the purpose of current use for any commercial purpose specified in section 71-113, a weight or measure that does not bear a seal or mark such as is specified in section 71-117, unless such weight or measure has been exempted from testing by the provisions of section 71-113 or by a regulation of the director issued under the authority of section 71-111, or unless the apparatus has been placed in service as provided by a regulation of the director issued under the authority of section 71-111.

(3) Dispose of any rejected or condemned weight or measure in a manner contrary to law or regulation.

(4) Remove from any weight or measure, contrary to law or regulation, any tag, seal, or mark placed thereon by the appropriate authority.

(5) Sell, or offer to expose for sale, less than the quantity he represents of any commodity, thing or service.

(6) Take more than the quantity he represents of any commodity, thing, or service, when, as buyer, he furnishes the weight or measure by means of which the amount of the commodity, thing, or service is determined.

(7) Keep for the purpose of sale, advertise, or offer or expose for sale, or sell any commodity, thing, or service in a condition or manner contrary to law or regulation.

(8) Use in retail trade, except in the preparation of packages put up in advance of sale and of medical prescriptions, a weight or measure that is not

so positioned that its indications may be accurately read and the weighing or measuring operation observed from some position which may reasonably be assumed by a customer.

(9) Violate any provision of this act or of the regulations promulgated under the provisions of this act for which a specific penalty has not been prescribed. [1969, ch. 43, § 30, p. 108.]

#### STATUTORY NOTES

**Cross References.** — Seizure of incorrect or unmarked weights, measures, or packages for use as evidence, § 71-118.

Use of fraudulent scales for ore, § 18-7206.

**Compiler's Notes.** — The words "this act" refer to S.L. 1969, ch. 43, compiled as §§ 71-108 — 71-120, 71-229 — 71-243, 71-303 — 71-308.

**71-306. Injunctions — Impounding of commodities.** — The director is authorized to apply to any district court for, and such court upon hearing and for cause shown may grant, a temporary or permanent injunction restraining any person from violating any provisions of this act, and may order any commodity or weight or measure to be seized and held pending the outcome of said action. [1969, ch. 43, § 31, p. 108.]

#### STATUTORY NOTES

**Cross References.** — Seizure of incorrect or unmarked weights, measures, or packages for use as evidence, § 71-118.

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-305.

**71-307. Presumptive proof of use of weight or measure.** — For the purposes of this act, proof of the existence of a weight or measure or a weighing or measuring device in or about any building, inclosure, stand or vehicle in which or from which it is shown that buying or selling is commonly carried on, shall, in the absence on [of] conclusive evidence to the contrary, be presumptive proof of the regular use of such weight or measure or weighing or measuring device for commercial purposes and of such use by the person in charge of such building, inclosure, stand or vehicle. [1969, ch. 43, § 32, p. 108.]

#### STATUTORY NOTES

**Cross References.** — Seizure of incorrect or unmarked weights, measures, or packages for use as evidence, § 71-118.

"of" was inserted by the compiler.

For words "this act" see Compiler's notes, § 71-305.

**Compiler's Notes.** — The bracketed word

**71-308. Review of orders — Appeal.** — (1) Any person aggrieved by any "stop-use order," "stop-removal order," "removal order," "rejection," "condemnation," "off sale order" or other action or investigation made or done pursuant to this act may within thirty (30) days after an order is issued or any action is taken, petition the director for a hearing to determine the matter as provided for in relation to contested cases by chapter 52, title 67,

Idaho Code, and may thereafter as provided for in chapter 52, title 67, Idaho Code, appeal any decision of the director.

(2) The director shall give due notice and hold a hearing within ten (10) days after confiscating any apparatus or commodity under section 71-117 or seizing any apparatus of [or] commodity for evidence under section 71-118. Said hearing shall be held under the provisions of chapter 52, title 67, Idaho Code, and shall be for the purpose of determining whether any such commodity or apparatus was properly confiscated or seized, and to determine whether or not such commodity or apparatus was used for, or is in, violation of any provision of this act, and to determine the disposition to be made of such commodity or apparatus. Any such decision may be appealed from as provided for in chapter 52, title 67, Idaho Code. [1969, ch. 43, § 33, p. 108.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed word “or” in subsection (2) was inserted by the compiler.

For words “this act” see Compiler's notes, § 71-305.

Section 35 of S.L. 1969, ch. 43 read: “If any provision of this act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the act and the applicability thereof to other persons and circumstances shall not be affected thereby.”

Section 36 of S.L. 1969, ch. 43 repealed all laws and parts of laws contrary to or inconsistent therewith and specifically repealed chapter 1, title 71; chapter 2, title 71; chapter 3, title 71; and §§ 18-7201 — 18-7205 insofar as they might operate in the future, but provided that, as to offenses committed, liabilities incurred, and claims existing thereunder at the time of such repeal, they should remain in full force and effect.

**Effective Dates.** — Section 37 of S.L. 1969, ch. 43 provided that the act should become effective on the first day of July, 1969.

## CHAPTER 4

### LICENSING OF WEIGHMASTERS

#### SECTION.

- 71-401. Short title — Definitions.
- 71-402. Licensing of weighmasters.
- 71-403. [Repealed.]
- 71-404. Posting of license.
- 71-405. Certified copies of license.
- 71-406. Signature of licensed weighmaster.

#### SECTION.

- 71-407. Giving false weight tickets.
- 71-408. Enforcement of act — Rules and regulations.
- 71-409. Disposition of fees.
- 71-410. Revocation of license.
- 71-411. Standard weight and tare ticket.

**71-401. Short title — Definitions.** — (a) This chapter may be cited as the “Weighmaster's Licensing Act.”

(b) Definitions — When used in this act:

1. “Director” means the director of the Idaho department of agriculture.
2. “Department” means the department of agriculture of the state of Idaho.
3. “Public weighmaster” means any person licensed as a weighmaster by the director of the state department of agriculture.
4. “Licensed weighmaster” or “weighmaster” means any person licensed under the provisions of this chapter, who weighs grains, dry peas, potato starch, dry beans, leguminous and all other small seeds, hay, wool, bulk potatoes, bulk fertilizers, sugar beets, and feeds, not including minerals,



or any of them. [I. C. A., § 69-401, as added by 1949, ch. 155, § 1, p. 332; am. 1976, ch. 120, § 1, p. 461.]

### RESEARCH REFERENCES

**C.J.S.** — 94 C.J.S., *Weights and Measures*, § 6.

**71-402. Licensing of weighmasters.** — Any person acting as a public weighmaster of grains, dry peas, potato starch, dry beans, leguminous and all other small seeds, hay, wool, bulk potatoes, bulk fertilizers, sugar beets and feeds (not including minerals) or any of them shall make application to the director of the department for a weighmaster's license. Application for a weighmaster's license shall be in writing on a form prescribed by the director. Each applicant shall furnish satisfactory evidence of good moral character, ability to weigh accurately and to make correct weight tickets. Upon receipt of the application with satisfactory evidence of qualifications, on or before July 1, 1949, and annually thereafter, and a license fee of ten dollars (\$10.00), the director shall issue an annual weighmaster's license. No weighmaster's license shall be issued to any applicant for such license who is under the age of eighteen (18) years, or to any person whose license issued under this act has been revoked. [I.C.A., § 69-402, as added by 1949, ch. 155, § 1, p. 332; am. 1957, ch. 99, § 1, p. 173; am. 1961, ch. 52, § 1, p. 80; am. 1967, ch. 185, § 1, p. 612; am. 1974, ch. 18, § 243, p. 364; am. 1984, ch. 18, § 1, p. 20; am. 2001, ch. 145, § 1, p. 514.]

### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

The words "this act" refer to S.L. 1949, ch. 155, compiled as §§ 71-401, 71-402, 71-404 — 71-411.

### 71-403. Bond. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C.A., § 69-403, as added by 1949, ch. 155, § 1, p. 332; am. 1974, ch. 18, § 244, p.

364; am. 1980, ch. 149, § 1, p. 318, was repealed by S.L. 1984, ch. 18, § 2.

**71-404. Posting of license.** — All weighmasters licensed under the provisions of this act shall post the original or certified copy of the weighmaster's license in a conspicuous place on the premises where the weighmaster is engaged in weighing. [I.C.A., § 69-404, as added by 1949, ch. 155, § 1, p. 332.]

### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 71-402.

**71-405. Certified copies of license.** — A certified copy of a weighmaster's license may be procured by the holder of the original upon payment of a fee of two dollars and fifty cents (\$2.50) for each copy of each license. [I.C.A., § 69-405, as added by 1949, ch. 155, § 1, p. 332; am. 1984, ch. 18, § 3, p. 20.]

**71-406. Signature of licensed weighmaster.** — No person shall sign the name of a weighmaster licensed under the provisions of this act except the person to whom the weighmaster's license is issued. [I.C.A., § 69-406, as added by 1949, ch. 155, § 1, p. 332; am. 1957, ch. 99, § 2, p. 173.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act"  
see Compiler's notes, § 71-402.

**71-407. Giving false weight tickets.** — Any person who shall mark, alter, stamp, or write any false weight ticket, scale ticket, or weight certificate, knowing it to be false, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not to exceed three hundred dollars (\$300) for each offense, or imprisoned in the county jail for not more than six (6) months, or both. [I.C.A., § 69-407, as added by 1949, ch. 155, § 1, p. 332; am. 1957, ch. 99, § 3, p. 173.]

**71-408. Enforcement of act — Rules and regulations.** — The director of the department of agriculture may adopt and publish rules and regulations necessary for the administration of this act. [I. C. A., § 69-408, as added by 1949, ch. 155, § 1, p. 332; am. 1974, ch. 18, § 245, p. 364.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act"  
see Compiler's notes, § 71-402.

**71-409. Disposition of fees.** — All fees collected by the director of the department of agriculture under the provisions of this act shall be deposited by him in the state treasury to the credit of the general fund. [I. C. A., § 69-409, as added by 1949, ch. 155, § 1, p. 332; am. 1950 (E.S.), ch. 13, § 1, p. 24; am. 1974, ch. 18, § 246, p. 364.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" (E.S.), ch. 13 provided that said act should be  
see Compiler's notes, § 71-402. in full force and effect on and after July 1,  
**Effective Dates.** — Section 3 of S.L. 1950 1950.

**71-410. Revocation of license.** — A license issued under the provisions of this act may be revoked by the director of the department of agriculture, or the renewal thereof, may be refused by the director, for dishonesty, incompetency, inaccuracy, for any false statement made in any

part of the application for a weighmaster's license, and for any violation of any of the provisions of this act. If the director shall refuse to grant any license provided for herein or shall refuse to grant a renewal thereof to any applicant, or shall revoke any license previously granted by him, he shall give such applicant, or licensee, fifteen (15) days' notice of his intended action in writing by registered mail, giving reasons therefor, and upon the request of the applicant or licensee, shall afford him an opportunity for hearing as early as practicable within not to exceed twenty (20) days after receipt of such request. Upon such hearing, the director or his duly authorized agent, may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a reexamination of the licensee. Upon such hearing, the director shall either rescind(,) his order of revocation or, good cause appearing therefor, may revoke such license. [I. C. A., § 69-410, as added by 1949, ch. 155, § 1, p. 332; am. 1974, ch. 18, § 247, p. 364.]

#### STATUTORY NOTES

**Compiler's Notes.** — The comma following "rescind" in the last sentence was placed in parentheses by the compiler as surplusage.

For words "this act" see Compiler's notes, § 71-402.

**Effective Dates.** — Section 263 of S.L. 1974, ch. 18 provided this act take effect on and after July 1, 1974.

**71-411. Standard weight and tare ticket.** — All commodities weighed on public platform scales, having a capacity of five (5) tons or over, shall be recorded on standard weight and tare ticket prepared in triplicate, stating:

- (a) Name and address of licensed weighing agency,
- (b) Serial number,
- (c) Date,
- (d) Owner of commodity weighed,
- (e) Kind of commodity being weighed,
- (f) Gross weight of load,
- (g) Tare,
- (h) Net weight,
- (i) Full signature of weigher.

However, in weighing sugar beets, I.B.M. cards may be used in lieu of the standard weight ticket if such cards identify the following:

- (a) Name and address of licensed weighing agency,
- (b) Serial number,
- (c) Date,
- (d) Some identification of the owner of the commodity weighed, such as name or a number,
- (e) Gross weight of load,
- (f) Light weight of truck. [I.C.A., § 69-411, as added by 1949, ch. 155, § 1, p. 332; am. 1967, ch. 251, § 1, p. 718.]





## TITLE 72

### WORKER'S COMPENSATION AND RELATED LAWS — INDUSTRIAL COMMISSION

#### PART I

##### CHAPTER

1. SHORT TITLE — DEFINITIONS, §§ 72-101 — 72-103.
2. SCOPE — COVERAGE — LIABILITY, §§ 72-201 — 72-230.
3. SECURITY FOR COMPENSATION, §§ 72-301 — 72-334.
4. BENEFITS, §§ 72-401 — 72-451.
5. INDUSTRIAL COMMISSION, §§ 72-501 — 72-528.
6. EMPLOYER'S REPORTS, §§ 72-601 — 72-604.
7. PROCEDURES, §§ 72-701 — 72-737.
8. MISCELLANEOUS PROVISIONS, §§ 72-801 — 72-806.
9. STATE INSURANCE FUND, §§ 72-901 — 72-929.

##### CHAPTER

10. CRIME VICTIMS COMPENSATION, §§ 72-1001 — 72-1026.
- 11, 12. [RESERVED.]

#### PART II

13. EMPLOYMENT SECURITY LAW, §§ 72-1301 — 72-1385.

#### PART III

14. FIREMEN'S RETIREMENT FUND, §§ 72-1401 — 72-1472.
15. COMMISSION FOR REAPPORTIONMENT, §§ 72-1501 — 72-1508.
16. STATE DIRECTORY OF NEW HIRES, §§ 72-1601 — 72-1607.
17. IDAHO EMPLOYER ALCOHOL AND DRUG-FREE WORKPLACE ACT, §§ 72-1701 — 72-1717.

## PART I

### CHAPTER 1

#### SHORT TITLE — DEFINITIONS

##### SECTION.

- 72-101. Short title.  
72-102. Definitions.  
72-103. Temporary and professional employers.

**72-101. Short title.** — (1) This law may be cited as the worker's compensation law.

(2) Wherever in title 72, Idaho Code, references appear to the term workmen's compensation this shall be deemed to mean worker's compensation. [I.C., § 72-101, as added by 1971, ch. 124, § 3, p. 422; am. 1989, ch. 191, § 1, p. 473.]

#### STATUTORY NOTES

**Cross References.** — Employers' liability act, §§ 44-1401 — 44-1407.

Ridesharing, exemption of, § 49-2432.

Vocational rehabilitation of persons disabled in industry, §§ 33-2301 — 33-2308.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

Section 1 of S.L. 1971, ch. 124 read: "This act is a comprehensive recodification of the

workmen's compensation and occupational disease compensation laws of the state of Idaho."

Section 2 of said act read: "Chapters 1, 2, 3, 4, 5, 6, 7, 8, 10, 11 and 12, Title 72, Idaho Code, and other acts and parts of acts inconsistent with this law are hereby repealed, such repeal to be effective as of the effective date of this law, provided that said chapters, acts and parts of acts shall remain in effect as

to injuries suffered and occupational diseases manifested prior to the effective date of this law."

Section 4 of said act read: "If any provision of this law is declared to be unconstitutional, the same shall not affect the validity of the remainder of the law, or any part thereof which can be given effect without the part so

decided to be unconstitutional."

Section 5 of said act provided that the act should become effective January 1, 1972.

S.L. 1971, ch. 124 replaces the Workmen's Compensation Law enacted in 1917 except for provisions relating to the state insurance fund found in ch. 9.

## JUDICIAL DECISIONS

### ANALYSIS

Compensable disablement.

Course of employment.

Dual purpose doctrine.

Remote work doctrine.

### Compensable Disablement.

A claimant seeking compensation for an employment related injury has the burden of showing a "compensable disablement" under the Idaho Worker's Compensation law. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

In granting summary judgment for the company, whose manager engaged in sexual intercourse with a minor employee, the district court had concluded that the minor suffered an injury, a broken hymen, caused by an accident at work. However, a ruptured hymen was not "an unexpected, undesigned, and unlooked for mishap, or untoward event"; it was something that typically occurred when a virgin engaged in sexual intercourse. Consequently, since there was no accident, as defined by § 72-102(17)(b), the minor did not suffer a personal injury, as defined by § 72-102(17)(c), and her tort claims were not preempted by the exclusivity provisions of the Idaho Worker's Compensation Act. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

### Course of Employment.

Home care provider failed to meet her burden of proving she received a bite which allegedly caused Lyme disease in the course of her employment. *Koester v. State Ins. Fund*, 124 Idaho 205, 858 P.2d 744 (1993).

Although a slight or expectable deviation from a business route or purpose is permissible under the dual purpose doctrine, if subsequent detours were such deviations from the business purpose of the trip that they broke the causal chain leading to the accident, the accident could not be said to have arisen out of or in the course of the worker's employ-

ment. *Mondragon v. A & L Reforestation, Inc.*, 130 Idaho 305, 939 P.2d 1384 (1997).

### Dual Purpose Doctrine.

Where there was evidence that employee-claimant and crew members after leaving lodge where they had consumed one beer and according to witnesses had a slight altercation with some other patrons were, when the accident happened, headed towards both their camp site as well as two establishments that sold alcohol, the Commission's decision that there was sufficient deviation from employee's purpose to render the dual purpose doctrine inapplicable was proper. *Mondragon v. A & L Reforestation, Inc.*, 130 Idaho 305, 939 P.2d 1384 (1997).

### Remote Work Doctrine.

Where work site was not sufficiently remote or isolated, as it was near several cities, where the availability of social drinking in lodge 10 miles from the camp site did not appear to be an incentive for employment with the employer and with regard to the recreational activity of social drinking, the circumstances of the employee's employment were not any different or more hazardous than any other employment, and thus the evidence did not present factual circumstances for the application of the remote work doctrine permitting compensation of workers living at remote work sites who are injured while engaging in recreational activities. *Mondragon v. A & L Reforestation, Inc.*, 130 Idaho 305, 939 P.2d 1384 (1997).

**Cited in:** *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981); *Sherrard v. City of Rexburg*, 113 Idaho 815, 748 P.2d 399 (1988).

**72-102. Definitions.** — Words and terms used in the worker's compensation law, unless the context otherwise requires, are defined in the subsections which follow:



(1) "Alien" means a person who is not a citizen, a national or a resident of the United States or Canada. Any person not a citizen or national of the United States who relinquishes or is about to relinquish his residence in the United States shall be regarded as an alien.

(2) "Balance billing" means charging, billing, or otherwise attempting to collect directly from an injured employee payment for medical services in excess of amounts allowable in compensable claims as provided by rules promulgated by the commission pursuant to section 72-508, Idaho Code.

(3) "Beneficiary" means any person who is entitled to income benefits or medical and related benefits under this law.

(4) "Burial expenses" means a sum, not to exceed six thousand dollars (\$6,000) for funeral and burial or cremation, together with the actual expenses of transportation of the employee's body to his place of residence within the United States or Canada.

(5) "Commission" means the industrial commission.

(6) "Community service worker" means:

(a) Any person who has been convicted of a criminal offense, any juvenile who has been found to be within the purview of chapter 5, title 20, Idaho Code, and who has been informally diverted under the provisions of section 20-511, Idaho Code, or any person or youth who has been diverted from the criminal or juvenile justice system and who performs a public service for any department, institution, office, college, university, authority, division, board, bureau, commission, council, or other entity of the state, or any city, county, school district, irrigation district or other taxing district authorized to levy a tax or an assessment or any other political subdivision or any private not-for-profit agency which has elected worker's compensation insurance coverage for such person; or

(b) Parolees under department of correction supervision, probationers under court order or department of correction supervision and offender residents of community work centers under the direction or order of the board of correction who are performing public service or community service work for any of the entities specified in paragraph (6)(a) of this section other than the department of correction.

(7) "Compensation" used collectively means any or all of the income benefits and the medical and related benefits and medical services.

(8) "Custom farmer" means a person who contracts to supply operated equipment to a proprietor of a farm for the purpose of performing part or all of the activities related to raising or harvesting agricultural or horticultural commodities.

(9) "Death" means death resulting from an injury or occupational disease.

(10) Dependency limitations.

(a) "Adopted" and "adoption" include cases where persons are treated as adopted as well as those of legal adoption unless legal adoption is specifically provided.

(b) "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption.

(c) "Child" includes adopted children, posthumous children, and acknowledged illegitimate children, but does not include stepchildren unless actually dependent.

(d) "Grandchild" includes children of legally adopted children and children of stepchildren, but does not include stepchildren of children, stepchildren of stepchildren, or stepchildren of adopted children unless actually dependent.

(e) "Parent" includes stepparents and parents by adoption.

(f) "Grandparent" includes parents of parents by adoption, but does not include parents of stepparents, stepparents of parents, or stepparents of stepparents.

(11) "Disability," for purposes of determining total or partial temporary disability income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

(12) "Employee" is synonymous with "workman" and means any person who has entered into the employment of, or who works under contract of service or apprenticeship with, an employer. It does not include any person engaged in any of the excepted employments enumerated in section 72-212, Idaho Code, unless an election as provided in section 72-213, Idaho Code, has been filed. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to his dependents as herein defined, if the context so requires, or, where the employee is a minor or incompetent, to his committee or guardian or next friend.

(13)(a) "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. If the employer is secured, it means his surety so far as applicable.

(b) "Professional employer" means a professional employer as defined in chapter 24, title 44, Idaho Code.

(c) "Temporary employer" means the employer of temporary employees as defined in section 44-2403(7), Idaho Code.

(d) "Work site employer" means the client of the temporary or professional employer with whom a worker has been placed.

(14) "Farm labor contractor" means any person or his agent or subcontractor who, for a fee, recruits and employs farm workers and performs any farm labor contracting activity.

(15) "Gender and number." The masculine gender includes the feminine and neuter; "husband" or "wife" includes "spouse"; the singular number includes plural and the plural the singular.

(16) "Income benefits" means payments provided for or made under the provisions of this law to the injured employee disabled by an injury or occupational disease, or his dependents in case of death, excluding medical and related benefits.

(17) "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the right to control or



actual control of his principal as to the result of his work only and not as to the means by which such result is accomplished. For the purposes of worker's compensation law, a custom farmer is considered to be an independent contractor.

(18) "Injury" and "accident."

(a) "Injury" means a personal injury caused by an accident arising out of and in the course of any employment covered by the worker's compensation law.

(b) "Accident" means an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury.

(c) "Injury" and "personal injury" shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury.

(19) "Manifestation" means the time when an employee knows that he has an occupational disease, or whenever a qualified physician shall inform the injured worker that he has an occupational disease.

(20) "Medical and related benefits" means payments provided for or made for medical, hospital, burial and other services as provided in this law other than income benefits.

(21) "Medical services" means medical, surgical, dental or other attendance or treatment, nurse and hospital service, medicines, apparatus, appliances, prostheses, and related services, facilities and supplies.

(22) "Occupational diseases."

(a) "Occupational disease" means a disease due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of, and peculiar to the trade, occupation, process, or employment, but shall not include psychological injuries, disorders or conditions unless the conditions set forth in section 72-451, Idaho Code, are met.

(b) "Contracted" and "incurred," when referring to an occupational disease, shall be deemed the equivalent of the term "arising out of and in the course of" employment.

(c) "Disablement," except in the case of silicosis, means the event of an employee's becoming actually and totally incapacitated because of an occupational disease from performing his work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.

(d) "Disablement," in the case of silicosis, means the event of first becoming actually incapacitated, because of such disease, from performing any work in any remunerative employment; and "disability" means the state of being so incapacitated.

(e) "Silicosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of silicon dioxide ( $\text{SiO}_2$ ) dust.



(23) "Outworker" means a person to whom articles or materials are furnished to be treated in any way on premises not under the control or management of the person who furnished them.

(24) "Person" means the state or any political subdivision thereof, or any individual, partnership, firm, association, trust, corporation, including the state insurance fund, or any representative thereof.

(25) "Physician" means medical physicians and surgeons, ophthalmologists, otorhinolaryngologists, dentists, osteopaths, osteopathic physicians and surgeons, optometrists, podiatrists, chiropractic physicians, and members of any other healing profession licensed or authorized by the statutes of this state to practice such profession within the scope of their practice as defined by the statutes of this state and as authorized by their licenses.

(26) "Provider" means any person, firm, corporation, partnership, association, agency, institution, or other legal entity providing any kind of medical services related to the treatment of an injured employee which are compensable under Idaho's worker's compensation law.

(27) "Secretary" means the secretary of the commission.

(28) "Self-insurer" means an employer who has been authorized under the provisions of this law to carry his own liability to his employees covered by this law.

(29) "State" includes any state, district, commonwealth, zone or territory of the United States or any province of Canada.

(30) "Surety" means any insurer authorized to insure or guarantee payment of worker's compensation liability of employers in any state; it also includes the state insurance fund, a self-insurer and an inter-insurance exchange.

(31) "United States," when used in a geographic sense, means the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone and the territories of the United States.

(32) "Wages" and "wage earning capacity" prior to the injury or disablement from occupational disease mean the employee's money payments for services as calculated under section 72-419, Idaho Code, and shall additionally include the reasonable market value of board, rent, housing, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as part of his remuneration, and gratuities received in the course of employment from others than the employer. "Wages" shall not include sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment.

(33) "Wages" and "wage earning capacity" after the injury or disablement from occupational disease shall be presumed to be the actual earnings after the injury or disablement, which presumption may be overcome by showing that those earnings do not fairly and reasonably represent wage earning capacity; in such a case wage earning capacity shall be determined in the light of all factors and circumstances which may affect the worker's capacity to earn wages.

(34) "Work experience student" means any person enrolled in the public school districts of this state and who, as part of his instruction, is enrolled

in a class or program for academic credit and for which the student is employed by, or works for, a private or governmental entity. The student need not receive wages from the private or governmental entity in order to be classified as a work experience student.

(35) “Worker’s compensation law” or “workmen’s compensation law” means and includes the worker’s compensation law of this state and any like or similar law of any state, United States, territory, or province of Canada. [I.C., § 72-102, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 208, § 1, p. 1538; am. 1978, ch. 264, § 1, p. 572; am. 1982, ch. 231, § 1, p. 608; am. 1987, ch. 49, § 1, p. 78; am. 1989, ch. 155, § 12, p. 371; am. 1990, ch. 335, § 1, p. 912; am. 1993, ch. 341, § 1, p. 1277; am. 1994, ch. 112, § 1, p. 255; am. 1994, ch. 446, § 1, p. 1427; am. 1996, ch. 194, § 2, p. 604; am. 1997, ch. 130, § 1, p. 393; am. 1997, ch. 274, § 1, p. 799; am. 2004, ch. 149, § 1, p. 479; am. 2006, ch. 206, § 1, p. 627.]

### STATUTORY NOTES

**Cross References.** — “Average weekly state wage” determined, § 72-409.

“Average weekly wage” determined, § 72-419.

Burden of proof, see notes to § 72-714, subheading, “Burden of Proof.”

“Day” defined, § 72-418.

“Dependents” defined, § 72-410.

“Employment” defined, § 72-204.

“Evaluation (rating) of permanent disability” defined, § 72-425.

“Evaluation (rating) of permanent impairment” defined, § 72-424.

“Occupational diseases” defined, § 72-438.

“Permanent disability” or “under a permanent disability” defined, § 72-423.

“Permanent impairment” defined, § 72-422.

“Permanent physical impairment” defined, § 72-332.

Presumption that injury arose in course of employment when employee is killed or physically or mentally unable to testify, § 72-228.

“Week” defined, § 72-418.

“Whole man” defined, § 72-426.

**Amendments.** — This section was amended by two 1997 acts — ch. 130, § 1 and ch. 274, § 1, both effective July 1, 1997 — which appear to be compatible and have been

compiled together. In subsection (5) the amendment by both acts substituted “chapter 5, title 20” for “chapter 18, title 61” and “20-511” for “16-1807,” and in present subsection (21)(e) substituted “Silicosis” for “Silicoses”. In addition, the amendment by ch. 130, § 1 designated the former paragraph of subsection (12) as (12)(a) and in the third sentence of (12)(a) substituted “workers” for “workmen” and added subdivisions (12)(b)-(d) and the amendment by ch. 274, § 1 added a new subsection (18) and renumbered former subsections (18)-(32) as present subsections (19)-(33).

The 2006 amendment, by ch. 206, added subsections (2) and (26), and redesignated the remaining subsections accordingly.

**Compiler’s Notes.** — The words “this law”, as they appear in subsection (2), refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 21 of S.L. 1989, ch. 155 provided that the act should take effect January 15, 1990.

Section 6 of S.L. 1996, ch. 194 provided that the act should be in full force and effect on and after January 1, 1997.

Section 3 of S.L. 2004, ch. 149 declared an emergency. Approved March 23, 2004.

### JUDICIAL DECISIONS

#### ANALYSIS

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### **Accident.**

The definition of “accident,” which requires that an injury, to be compensable, must be caused by an event or mishap which can reasonably be located as to time when and place where it occurred, does not necessarily exclude compensation for conditions resulting from repetitive trauma over a period of time. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

Where claimant suffered spinal disc rupture while operating a front-end loader which subjected him to continual jarring and shaking, the evidence established that he suffered his injury at a particular time, at a particular place, while engaged in his normal and ordinary work for his employer; the fact that his spine may have been weak and predisposed him to a ruptured disc did not prevent an award since the compensation law does not limit awards to workmen who, prior to injury, were in sound condition and perfect health but, rather, an employer takes an employee as he finds him. *Wynn v. J.R. Simplot Co.*, 105

Idaho 102, 666 P.2d 629 (1983).

In order to constitute an accident, the claimant need not show that he or she suffered injury at a particular time and at a particular place, but rather must reasonably locate the injury as to time when and place where it occurred. *Hazen v. General Store*, 111 Idaho 972, 729 P.2d 1035 (1986).

There was more than sufficient substantial, competent evidence to sustain the finding of the industrial commission that the claimant's herniated disk was not the result of an accident but rather occurred over a longer period of time, as the result of the aging process, given the testimony of an expert witness, the claimant's own testimony, the testimony of her employment supervisor, and the history taken by the chiropractor. *Hazen v. General Store*, 111 Idaho 792, 729 P.2d 1035 (1986).

The industrial commission properly understood that subdivision (14)(b) (now (18)(b)) of this section only requires an accident to be reasonably located as to time and place where the issue before the Commission was whether



or not an industrial accident had occurred at all. *Blackwell v. Omark Indus.*, 114 Idaho 10, 752 P.2d 612 (1988).

Worker's compensation claimant's back injury was properly held not to have been an accident under this section where claimant never identified her pain to her doctor as work related, where she did not report any work related injury to her employer until six weeks after the alleged accident, where she had been experiencing intermittent back pain for the previous six years, and where the record contained evidence that claimant's problem may have been ongoing and not the result of an "unlooked for mishap, or untoward event." *Vernon v. Omark Indus.*, 115 Idaho 486, 767 P.2d 1261 (1989).

Workers' compensation claimant bears the burden of proving that an injury-causing accident occurred by proving that an unexpected, undesigned, and unlooked for mishap or untoward event took place, and where claimant's injury was an aggravation of an existing knee injury sustained in 1987, claimant did not meet this burden and industrial commission's finding that he failed to prove the occurrence of a compensable accident within the meaning of this section was based on substantial and competent evidence and was not clearly erroneous. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

There was no finding of an "accident" within the terms of subdivision (17)(b) [now (18)(b)] and the actions cited by the Commission were not sufficient to support the finding of an "accident" as defined by this section and interpreted by the courts. *Combes v. State, Indus. Special Indem. Fund*, 130 Idaho 430, 942 P.2d 554 (1997).

Employee failed to prove that he was injured as a result of workplace accidents pursuant to subdivision (17)(b) [now (18)(b)] where he gave contradictory statements regarding the time of the alleged accidents and where no medical records mentioned the mishaps in question; he bore the burden of establishing an accident by a preponderance of the evidence and failed to do so. *Painter v. Potlatch Corp.*, 138 Idaho 309, 63 P.3d 435 (2003).

Aggravation of the worker's pre-existing condition in her thumbs caused by repetitive motion did not become an accident simply because the worker could locate the time period when the pre-existing condition became symptomatic; therefore, the findings of the Idaho industrial commission did not show an accident as defined in subsection (17). *Konvalinka v. Bonneville County*, 140 Idaho 477, 95 P.3d 628 (2004).

Idaho industrial commission erred in concluding that the claimant did not experience an "accident" when she rose from the chair;

the injury resulted from an unexpected mishap arising out of her employment. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005).

In granting summary judgment for the company, whose manager engaged in sexual intercourse with a minor employee, the district court had concluded that the minor suffered an injury, a broken hymen, caused by an accident at work. However, a ruptured hymen was not "an unexpected, undesigned, and unlooked for mishap, or untoward event"; it was something that typically occurred when a virgin engaged in sexual intercourse. Consequently, since there was no accident, as defined by subdivision (17)(b) [now (18)(b)], the minor did not suffer a personal injury, as defined by subdivision (17)(c) [now (18)(c)], and her tort claims were not pre-empted by the exclusivity provisions of the Idaho Worker's Compensation Act. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

#### —Causal Connection.

The claimant's proof must establish a probable, not merely a possible, connection to the cause and effect to support a contention that the compensable accident occurred. *Vernon v. Omark Indus.*, 113 Idaho 358, 744 P.2d 86 (1987).

Injury was not compensable where the industrial commission determined that the claimant, a flagger on highway construction sites, did not report the accident to her employer within the 60 day period required by law, that the alleged accident did not occur, and that claimant's concededly debilitated condition was not sufficiently causally related to any incident that occurred during the course of her employment for it to be compensable. *Becker v. Flaggers*, 120 Idaho 521, 817 P.2d 187 (1991).

Where industrial commission concluded that claimant's accident failed to rise to a compensable level, as defined by subsection (15) [now (18)] of this section, because worker failed to provide any proof, to a reasonable degree of medical certainty, that the damage asserted was caused by the accident and failed to demonstrate on appeal that the commission's holding was clearly erroneous or that its finding was not supported by substantial and competent evidence under § 72-732, the commission's conclusion was affirmed. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

Where worker made a claim for occupational disease, the claimant had the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation was claimed and occupational exposure to the substance or conditions which caused the alleged condition, and although physician's records

indicated that claimant's work environment may have irritated his asthma condition, none stated that his condition was related, with a reasonable degree of probability, to his work environment, thus the industrial commission's conclusion denying compensation was supported by substantial and competent evidence and would not be disturbed on appeal. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

Although the physician expressly refused to say the words "reasonable degree of medical probability," it is clear from his testimony that he considered that the employee's renal failure to be more likely than not caused by his ingestion of the medication received at work; and the physician's testimony, coupled with the facts, adequately established a causal connection between the employee's ingestion of the medication and his renal failure. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000).

Employee's shoulder injury resulting from reaching across a conveyor belt met the definition of an accident as defined by subsection (17)(b) [now (18)(b)] of this section. It was an unexpected, unlooked for mishap resulting from her employment and could be reasonably located in time and place to the specific reaching incident that occurred on a specific date, so it was caused by an accident in the course of her employment. *Spivey v. Novartis Seed, Inc.*, 137 Idaho 29, 43 P.3d 788 (2002).

### Accidents Covered.

From the employee's perspective, the injury that befell him was an accident as it was an untoward event, connected to the industry in which it occurred, which could be reasonably located as to time and place; it was no contradiction for the employee to maintain he suffered an accident covered by worker's compensation and at the same time argue he was harmed by the employer's intentional acts. *Dominguez v. Evergreen Res., Inc.*, — Idaho —, 121 P.3d 938 (2005).

### Aggravation of Underlying Disease.

Although claimant argued that his underlying disease was aggravated sufficiently by his employment to render him disabled, the aggravation was not the result of an industrial accident and would not be compensable; otherwise, any distinction between "injury" and "occupational disease" would be meaningless. *Nycum v. Triangle Dairy Co.*, 109 Idaho 858, 712 P.2d 559 (1985).

Where there was conflicting evidence as to the cause of claimant's hand condition, the industrial commission's finding that claimant's hand condition was not an occupational disease under subdivision (17)(a) [now (22)(a)] of this section because it was causally related to his diabetes and not to his employment was supported by substantial, compe-

tent evidence on the record and therefore was not clearly erroneous as a matter of law. *Nycum v. Triangle Dairy Co.*, 109 Idaho 858, 712 P.2d 559 (1985).

A series of mini-traumas caused by the repetitive motions of claimant's job did not constitute an identifiable accident for purposes of compensating the aggravation of carpal tunnel syndrome. *Nelson v. Ponsness-Warren Idgas Enters.*, 126 Idaho 129, 879 P.2d 592 (1994).

### Application.

This section had no bearing upon the question of whether the property owner owed the plaintiff a duty of care when the plaintiff was injured while working for an independent contractor on the property, because the definition of employer found in this section governs only the status of the parties under the worker's compensation laws and this definition did not apply in this case as it was not a worker's compensation case. *Gneiting v. Idaho Asphalt Supply, Inc.*, 130 Idaho 393, 941 P.2d 932 (Ct. App. 1997).

### Burden of Proof.

A claimant in a workmen's compensation cause has the burden of proving compensable disablement, caused by an accident arising out of and in the course of his employment. His proof must establish a probable, not merely a possible, connection between cause and effect to support his contention that he suffered a compensable accident. *Callantine v. Blue Ribbon Linen Supply*, 103 Idaho 734, 653 P.2d 455 (1982).

Claimant failed to meet her burden of proving a reasonable degree of medical probability that the injury for which benefits were claimed were causally related to her on-the-job accident where she testified that she was in unrelenting pain between July, 1989, the time of the work related injury, and June, 1990, when the surgery for myelopathy occurred, but doctor testified that it was not likely that claimant could have functioned for the 11 months if the on-the-job accident had caused her myelopathy and that it was unlikely for such a condition to occur related to something 11 months earlier, although 2 other doctors gave conflicting opinions indicating that the injury was related to the injury that occurred at work, since the commission and not the Supreme Court, evaluates the credibility of expert witnesses and the commission accepted the first doctor's opinion. *Trimble v. Engelking*, 130 Idaho 300, 939 P.2d 1379 (1997).

### Community Service Worker.

Inmate who was injured while performing maintenance duties of cleaning rain gutters at the correctional facility where she was incarcerated was not considered to be a com-



munity service worker as defined in subsection (5) [now (6)] of this section, and was not entitled to worker's compensation benefits under § 72-205(7). *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999) (decided prior to 2004 amendment).

### **Compensable Injury.**

Where compensation claimant described no specific mishap or event which caused his knee injury, where the proof showed only that his knee gradually became painful and was extremely painful at the conclusion of his work shift, and that he had a history of injuring his knee in the previous year and where he testified that he had been experiencing some problems with his leg prior to commencement of his work shift, there was nothing in the record that would sustain a finding that he sustained an injury on the job that would entitle him to compensation. *Dolph v. Hecla Mining Co.*, 119 Idaho 715, 810 P.2d 249 (1991).

### **Compensation.**

"Compensation" is a word of art under the Workmen's Compensation Act and refers to income and medical benefits made under the provisions of the Act. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

Because medical benefits are included in the definition of compensation under this section, the payment of medical benefits under § 72-432(1) must be taken into account under § 72-706(2) to determine whether compensation was being paid when the limitation period provided in § 72-706(2) expired. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

### **Construction.**

The workmen's compensation law shall be liberally construed in favor of the injured workman. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

It is preferable to continue construing this section and § 72-438's categories of "accident" and "occupational disease" as mutually exclusive. *Bowman v. Twin Falls Constr. Co.*, 99 Idaho 312, 581 P.2d 770 (1978), overruled on other grounds, *Demain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 656 (1999).

Employee provided no authority for her claim that either "wages" or "wage earning capacity" as used in subsection (30) [now (33)] of this section, and "ability to engage in gainful activity" as used in § 72-425 are synonymous. *Vassar v. J.R. Simplot Co.*, 134 Idaho 495, 5 P.3d 475 (2000).

### **Date of Disablement.**

Without an explicit finding of the date when disablement occurred as a result of worker's injury the Supreme Court returned a work-

er's compensation case to the industrial commission; the date was necessary to accurately assess whether the commission properly allocated worker's compensation benefits between two sureties and to establish the statutory eligibility of the claimant. *Blang v. Basic Am. Foods*, 122 Idaho 66, 831 P.2d 534 (1992).

### **Disability.**

Whether an individual is disabled is not determined by whether that person is under the care of a physician but by whether that person has suffered a decrease in wage-earning capacity. *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980).

Where claimant testified as to statements made to him by his doctors indicating his physical impairment, but did not support his testimony with doctor's reports, depositions or a physician's oral testimony, his testimony did not constitute medical testimony which was necessary to support his claim for compensation; as a result, he failed to satisfy the burden required in order to establish his eligibility for total temporary disability benefits. *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980).

Where the employee suffered physical impairment which would have prevented employment, he suffered a decrease in wage earning capacity and thus a disability, and the fact that he enrolled in college rather than sitting at home during the healing process was irrelevant. *Malueg v. Pierson Enters.*, 111 Idaho 789, 727 P.2d 1217 (1986).

Substantial evidence did not support the commission's finding assessing temporary partial temporary disability benefits while worker was employed by a subsequent employer after her industrial accident; the commission made no finding that during worker's subsequent employment, worker suffered a decrease in wage earning capacity due to her injury. *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989).

Claimant who continued performing his meat cutting tasks at defendant company, which tasks induced his carpal tunnel syndrome, until the day he was terminated by defendant company and undisputedly continued similar meat cutting tasks at his subsequent employer was not disabled within the meaning of subsection (18)(c) [now (22)(c)] of this section and § 72-437 during his employment with defendant company and was not entitled to compensation benefits for medical treatment. *Kitchen v. Tidyman Foods*, 130 Idaho 1, 936 P.2d 199 (1997).

### **—Causality.**

Where claimant did not miss any work at the time of his initial back injury, suffered while working in 1982 for defendant, where he did not see a doctor about his back pain for



nearly five years, where he performed strenuous labor for employers other than defendant during that five-year period, and where he sought medical attention only on doctor's advice against taking a stress test relative to applying for a job several years after leaving defendant's employ, these facts substantiated the industrial commission's finding that claimant's current condition was not causally related to the injury he sustained in 1982 while working for defendant. *Cole v. Stokely Van Camp*, 118 Idaho 173, 795 P.2d 872 (1990).

An injured worker must do more than show an onset of pain while at work in order to sustain his or her burden of proving an event or mishap occurred, and standing for two hours did not an accident make, hence, claimant was not entitled to worker's compensation benefits. *Perez v. J.R. Simplot Co.*, 120 Idaho 435, 816 P.2d 992 (1991).

#### —“Odd-Lot” Worker.

There are three methods by which the employee may prove a prima facie case of odd-lot status: (1) by showing what other types of employment the employee has attempted, (2) by showing that the employee, or vocational counselors, employment agencies, or the Job Service on behalf of the employee, have searched for other work for the employee, and that other work was not available, or (3) any efforts of the employee to find suitable employment would have been futile. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

Employee sustained his burden of proving that while he was physically able to perform some work, he was so handicapped that he would not be employed regularly in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on his part; this is the formulation of “odd-lot” worker. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

Where estimates as to the portion of the jobs employee could have performed before his accident that he was precluded from performing after the accident ranged from 20 percent to 80 percent, the employee was not an “odd-lot” worker as a matter of law. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

#### —Apportionment.

Industrial commission erred in its determination that medical benefits awarded to workers' compensation claimant who was totally and permanently disabled under the odd-lot doctrine could be assessed totally against employer's surety and were not apportionable under the 1990 version of this section; though that would be the case following the 1991

amendments to this section, this award of medical benefits had to be apportioned in the same proportion as the determined responsibility of the Industrial Special Indemnity Fund (ISIF) and employer's surety for the nonmedical portions of the award. *Dohl v. PSF Indus., Inc.*, 127 Idaho 232, 899 P.2d 445 (1995).

#### Employee.

Since the relevant criteria for deciding “employee” status throughout the Workmen's Compensation Act is the “course of employment” test set forth in subdivision (14)(a) (now (18)(a)) of this section, that same standard is to be used to determine “employee” status for purposes of determining co-employee immunity. *Wilder v. Redd*, 111 Idaho 141, 721 P.2d 1240 (1986).

#### —Loaned Employee.

The claimant was a borrowed servant where the claimant was paid for his time, the claimant was performing services required by the company under its contract, and the claimant was under the supervision and control of the company. *Paullas v. Andersen Excavating*, 113 Idaho 156, 742 P.2d 411 (1987).

#### Employer.

An agreement between defendant and other mine operators which provided that “the number of employees of the unit operator and their selection and the terms of labor and compensation for services performed, shall be determined by the unit operator, and the said employees shall be the employees of the unit operator” gave defendant the exclusive power to hire and thereby rendered it a direct “employer” for purposes of this section. *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), cert. denied, 439 U.S. 862, 99 S. Ct. 182, 58 L. Ed. 2d 171 (1978), overruled on other grounds, *Warren v. United States Dep't of Interior Bureau of Land Mgt.*, 724 F.2d 776 (9th Cir. 1984).

Small companies which shared in the profits of a mining business but which held essentially nonoperating interests could not be considered either direct or statutory employers for purposes of subdivision (10) (now (13)) of this section. *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), cert. denied, 439 U.S. 862, 99 S. Ct. 182, 58 L. Ed. 2d 171 (1978), overruled on other grounds, *Warren v. United States Dep't of Interior Bureau of Land Mgt.*, 724 F.2d 776 (9th Cir. 1984).

The expanded definition of “employer” in subdivision (10) (now (13)) of this section was designed to prevent an employer from avoiding liability under the workmen's compensation statutes by subcontracting the work to others who may be irresponsible and not insure their employees. *Runcorn v. Shearer*

Lumber Prods., Inc., 107 Idaho 389, 690 P.2d 324 (1984).

This state's Workmen's Compensation Law does not shield an employer of an independent contractor from tort liability for an injury incurred by the independent contractor's employee. *Peone v. Regulus Stud Mills, Inc.*, 858 F.2d 550 (9th Cir. 1988).

Where homeowner took an active role in the construction of his house by hiring subcontractors, providing them the necessary materials and coordinating their services, homeowner was an "employer" under the terms of subsection (11) (now (13)) of this section; however, homeowner was exempt from worker's compensation liability because he did not employ worker for the sake of pecuniary gain. *Dewey v. Merrill*, 124 Idaho 201, 858 P.2d 740 (1993).

The state was not liable for injuries to an employee of a logging company to which it sold timber rights on state owned property because the state was not an employer of the company and owed no duty of care to employees of the company. *Harpole v. State*, 131 Idaho 437, 958 P.2d 594 (1998).

Trial court correctly determined that a general contractor was immune from third-party tort liability pursuant to § 72-223 of the Idaho Worker's Compensation Act as a general contractor, given the definitions of employer under §§ 72-216, 72-102(12)(a) [now 72-102(13)(a)], and thus summary judgment under Idaho R. Civ. P. 56(c) was properly granted in the contractor's favor. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Given the statutory definition of employer under subdivision (12)(a) [now (13)(a)], the fact that this term and its applicable definition were imported almost word-for-word into § 72-223, and there was no indication within the Idaho Worker's Compensation Act that the legislature intended to overturn years of case law, the statutory employer analysis should be used when determining the plain meaning of § 72-223; the court finds the meaning of that section clear and unambiguous. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Under § 72-223, applying a more limited test to owners as opposed to subcontractors is supported by the express language and general purpose of the Idaho Worker's Compensation Act; it makes sense to have a rule that limits a property owner's liability under the statutory concept of "employer" under subdivision (12)(a) [now (13)(a)] while interpreting the contractor or subcontractor's liability more broadly. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Because a property owner was not in the business of construction or roof installation and did not employ individuals who were

trained in these areas, nor did it own materials or equipment necessary to engage in these areas, the owner was not a statutory employer under subdivision (12)(a) [now (13)(a)] of the Idaho Worker's Compensation Act and thus was not exempt from liability under § 72-223 in connection with a roof installation employee's third party negligence action; thus, the trial court erred in granting the owner summary judgment under Idaho R. Civ. P. 56(c). *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

### **Employer-Employee Relationship.**

In a wrongful death action, the determination of whether the decedent had been an employee of defendant, rather than an independent contractor or a casual employee, while engaged in making repairs to broken equipment at the bottom of a drill shaft, was a question of fact for the jury, for the question bore not only upon the issue of the court's jurisdiction but also upon the standard of care that defendant owed to the decedent. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

The hiring, furnishing, controlling, discharging and paying of assistants although not conclusive of the independent contractor relationship for "employment" within the meaning of the Workmen's Compensation Laws are indicia thereof, and are to be considered. *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978).

The integral test for "employment" within the meaning of the Workmen's Compensation Laws is whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978).

Every principal contractor necessarily extends to a subcontractor the right to do work on the involved premises, and the principal does not thereby necessarily change the status of a subcontractor to the status of an employee; therefore, the commission's rationale, in holding that alleged employer's ownership of timber cutting rights was a factor in determining employment status of claimant injured while working as a logger, was erroneous. *Ross v. Fiest*, 105 Idaho 119, 666 P.2d 646 (1983).

The test of whether a party is an "employer" under subdivision (10) (now (13)) of this section does not require the employer to control the means by which the work is performed; however, the right-to-control test is relevant in determining whether the injured person is an employee covered by workmen's compensation, or whether the person is an independent contractor not entitled to work-



men's compensation protection, and may also be relevant where a distinction must be made between a direct employer and a nondirect employer. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

The ultimate question in finding an employment relationship is whether the employer assumes the right to control the time, manner and method of executing the work of the employee, as distinguished from the right merely to require certain definite results in conformity with their agreement. Four factors are traditionally used in determining whether a "right to control" exists, including, (1) direct evidence of the right; (2) the method of payment; (3) furnishing major items of equipment; and (4) the right to terminate the employment relationship at will and without liability. *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985).

Horse trainer on ranch was held to be an employee and not an independent contractor, where although employers exercised no control over her horse-training activities, they retained direct control over a number of other activities and duties in which claimant was involved. *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985).

Coverage under workmen's compensation laws is dependent upon the existence of an employer-employee relationship. *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987).

The relationship between a dog breeder and a workmen's compensation claimant who cleaned the breeder's kennels was one of employer-employee where breeder clearly retained the right to terminate the relationship at will, without liability, not only as to the claimant, but to his predecessors in the position. *Partello v. Stipa*, 115 Idaho 522, 768 P.2d 785 (1989).

When doubt exists as to whether an individual is an employee or an independent contractor under the Workers' Compensation Act, the Act must be given a liberal construction by the industrial commission in favor of finding the relationship of employer and employee. *Olvera v. Del's Auto Body*, 118 Idaho 163, 795 P.2d 862 (1990).

Worker hired by subcontractor to shake roof on part time basis was ruled an employee of general contractor for the purpose of determining liability for workers' compensation benefits; although worker was paid on a production basis, subcontractor had right to control worker's work, the only major item of equipment was, in essence, supplied by subcontractor who rented the equipment from the worker, and the subcontractor and worker had the right to terminate their relationship at will and without liability. *Roman v. Horsley*, 120 Idaho 136, 814 P.2d 36 (1991).

When doubt exists as to whether an indi-

vidual is an employee or an independent contractor under Idaho's Worker's Compensation Act, the Act must be given a liberal construction by the industrial commission in its fact finding function in favor of finding the relationship of employer and employee. *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 905 P.2d 82 (1995).

In action for benefits for injuries sustained in accident by plaintiff who was driving defendant's truck under arrangement with regular driver to substitute for him for a quasi-contractual obligation to arise, the employer would have to have been unjustly enriched by his retention of the benefits of the plaintiff's services. However, where the employer was not unjustly enriched, even if he received a "benefit" from the plaintiff's services upon receipt of the contractor's payment, the employer indirectly compensated the plaintiff for his services for upon receiving payment from the contractor, the employer paid the driver the amount upon which they had agreed and the driver, in turn, paid the plaintiff the amount they had negotiated when the plaintiff agreed to substitute for the driver. Thus, the employer had already compensated the plaintiff for his services and, consequently, for the value of any "benefit" that the employer received. *Kennedy v. Forest*, 129 Idaho 584, 930 P.2d 1026 (1997).

Trial court properly granted summary judgment to a factory in a wrongful death action against it by a decedent's survivors because the factory qualified as the decedent's statutory employer, pursuant to § 72-216(1) and this section, due to its contractual relationship with the decedent's employer for wastewater hauling services. The factory was immune from third-party tort liability under § 72-223 of the Idaho Worker's Compensation Act. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

Trial court erred in finding that a farm, as a mere landowner, was decedent's statutory employer; nothing in the record indicated that the farm was engaged in the business of hauling wastewater for pecuniary gain, which was the work being done by the decedent. The farm was not entitled to immunity under § 72-223; summary judgment to the farm was affirmed on the alternate basis that the survivors failed to create a material issue of fact for trial that the farm breached any applicable duty of care, or how any breach proximately caused injury. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

#### —Control.

Four factors are used to determine whether a right to control exists: 1) direct evidence of the right, 2) method of payment, 3) furnishing major items of equipment, and 4) the right to terminate the relationship at will; when ap-



plying the right to control test the industrial commission must balance each of the elements present to determine their relative weight and importance, since none of the elements in itself is controlling. *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 905 P.2d 82 (1995).

The test in determining whether a worker is an independent contractor or an employee is whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results. *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 905 P.2d 82 (1995).

### **Incapacity.**

Where § 72-448 refers to incapacity, disability or death, the reference is not made to a partial incapacity, but rather total incapacity; "incapacity" does not refer to a partial incapacity, but rather to the total incapacity described in the statutory definition of disablement. *Cawley v. Idaho Nuclear Corp.*, 117 Idaho 34, 784 P.2d 890 (1989).

### **In General.**

A statutory employer is responsible for providing workmen's compensation coverage and, in return, is legally immune from suit by an employee based on injuries suffered in an industrial accident. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

### **Independent Contractor.**

The question of whether a particular person is an employee or an independent contractor is a question of fact, and if the determination of fact made by the industrial commission is supported by substantial competent evidence, the finding will not be disturbed on appeal. *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984).

The test to determine whether or not a claimant was an independent contractor and thus not covered by workmen's compensation is the "right to control" test. *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984).

Although the holder of harvest timbering rights told the worker the boundaries within which he was to cut the timber, what types of cuts were to be made, and where he was supposed to take the timber after it was cut, such directions established nothing more than the right merely to require certain definite results in conformity to the contract, such individual was an independent contractor. *Sines v. Sines*, 110 Idaho 776, 718 P.2d 1214 (1986).

Where the worker hired, controlled, and paid his own assistants; furnished his own equipment and tools; paid his own expenses; and decided when his crew was to begin work,

end work, and take breaks, he was an independent contractor rather than an employee. *Sines v. Sines*, 110 Idaho 776, 718 P.2d 1214 (1986).

In determining whether a worker is an employee or an independent contractor, the industrial commission must balance each of the four elements of the "right to control" test. *Hanson v. BCB, Inc.*, 114 Idaho 131, 754 P.2d 444 (1988).

The determination of whether an injured party is an independent contractor or an employee is a factual determination to be made on a case-by-case basis from full consideration of the facts and circumstances established by the evidence. *Olvera v. Del's Auto Body*, 118 Idaho 163, 795 P.2d 862 (1990).

The integral test with regard to determining whether an injured party is an employee or an independent contractor is whether the relationship or the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract. *Olvera v. Del's Auto Body*, 118 Idaho 163, 795 P.2d 862 (1990).

Where claimant, a painter at an auto body shop, was paid a substantially higher percentage of the paint labor charges than that which comparable painters were receiving at other auto body shops in the area, where he paid his own taxes and there was nothing withheld from payments due him for insurance, social security or other standard payroll deductions, where he provided his own paint guns and extensive personal equipment and hired his own assistants, and where the other workers at the body shop, although body and fender workers and not painters, were also independent contractors, an independent contractor relationship was found to exist despite the fact that the body shop provided an air compressor and work space for use by the workers including claimant. *Olvera v. Del's Auto Body*, 118 Idaho 163, 795 P.2d 862 (1990).

There was sufficient evidence in the record to support the commission's finding that claimant was not an independent contractor. Most of the tools and equipment were purchased by employer. Claimant had no authority to hire any other person to work with him. There was evidence that claimant was instructed to work regular hours each day, check in with the apartment manager when he arrived, inform the manager of what he intended to do that day, fill out forms to account for his time, and change the task he was doing when requested by the manager. He did not submit a bid for the work done. Instead, he was paid \$1,500 a month regardless of the amount of work completed. He was terminable at will. He was not hired for a specific result, but rather completed assigned

work as needed. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

Where the only evidence suggesting an independent contractor relationship was that one of the owners told worker that he would be an independent contractor, to which worker agreed, any such agreement whereby worker would be called an independent contractor, without him actually being one, was void for public policy. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

Benefits claimant was not awarded workers' compensation benefits for a fall from a ladder because he was an independent contractor under subsection (16) [now (17)]; the claimant worked his own hours, was paid a flat fee for constructing decks, no taxes were withheld, and personal tools were used. *Shriner v. Rausch*, 141 Idaho 228, 108 P.3d 375 (2005).

### **Injury.**

Where a neurosurgeon who treated claimant testified that in his opinion claimant was suffering from intercostal neuritis as a result of an industrial accident, there was substantial evidence to support commission's finding that claimant sustained a disabling injury as a result of a work-related accident. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

Where the evidence indicated that a claimant experienced three separate incidents of chest, neck, shoulder, arm and jaw pain while working in his capacity as a janitor, but other evidence indicated that the claimant's myocardial infarction preexisted the three work-related incidents, the industrial commission properly found that the exertion related to his movements on the three occasions did not cause damage to the claimant's physical structure and did not permanently aggravate the preexisting condition; accordingly, there was no injury as defined by subdivision (14)(c) (now (18)(c)) of this section and the claimant could not recover benefits. *Bush v. Bonner Ferry Sch. Dist. No. 101*, 102 Idaho 620, 636 P.2d 175 (1981).

Where the industrial commission referee found that according to claimant's various statements, the onset of claimant's hernia could have been anywhere from the end of September 1992 to the end of December 1992, a variation of three months, the referee concluded that claimant had not reasonably located the onset of his hernia. *Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 901 P.2d 511 (1995).

To qualify as a compensable accident, an unexpected mishap or untoward event must result "in violence to the physical structure of the body." *Beardsley v. Idaho Forest Indus.*, 127 Idaho 404, 901 P.2d 511 (1995).

While a worker's underlying pain and exac-

erbation of pain were work related, the worker failed to provide any medical evidence connecting the aggravation of her condition to an unexpected, undesigned and unlooked for mishap or untoward event, reasonably identifiable as to the time when and the place where it occurred, and therefore failed to show she suffered an "injury" caused by an "accident" as defined under subsection (17) [now (18)] of this section. *Tupper v. State Farm Ins.*, 131 Idaho 724, 963 P.2d 1161 (1998).

Where the employee provided evidence that the medication he received at work contributed to, if not caused, his injury, the employee's illness was an injury under the definition in subsection (17) [now (18)] of this section. *Jensen v. City of Pocatello*, 135 Idaho 406, 18 P.3d 211 (2000).

### **Legislative Intent.**

The public service aspect of community service envisioned by the legislature in subsection (5) [now (6)] of this section is other than the benefit derived by a correctional institution from having inmates engage in productive activities directed toward maintaining the prison facilities. *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999) (decided prior to 2004 amendment).

### **"Manifestation."**

Idaho industrial commission found the employee's knowledge that he suffered from an occupational disease coincided with his medical diagnosis, and the commission did not read subsection (18) [now (19)] to require a medical diagnosis as alleged by the employer; the record contained no suggestion that the employee's pain resulted from having aggravated a preexisting injury caused by an accident. *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005).

### **Medical Evidence.**

Generally, claims for workmen's compensation benefits must be supported by medical testimony; however, compliance with this rule does not require a claimant to be under the care of a physician at the time of the alleged disability in order to successfully claim benefits. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 714 P.2d 36 (1986).

### **Occupational Disease.**

Read together with § 72-439, subdivision (17)(c) (now (22)(c)) means that a claimant can receive no compensation for an occupational disease unless he is totally incapacitated from performing his work in the last occupation in which he was injuriously exposed to the hazard of such disease. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Where the claimant alleged no physical



injury, he had to bring his panic disorder within the definition of "occupational diseases" contained in subdivision (17) (now 19) of this section in order to recover. *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987).

An employee may be disabled more than once by a particular occupational disease. *Blang v. Basic Am. Foods*, 125 Idaho 275, 869 P.2d 1370 (1994).

The test set out in *Bowman v. Twin Falls Const. Co., Inc.*, 99 Idaho 312, 581 P.2d 770 (1978), to determine how the statutory phrase "characteristic of, and peculiar to" in the definition of "occupational disease" is to be construed, is properly applied to worker's compensation claims involving carpal tunnel syndrome. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000).

Pursuant to subdivision (21)(b) [now (22)(b)], as an occupational disease develops over time, it is possible for the disease to be "incurred" by a claimant under a series of different employers before it becomes manifest; in such a situation, § 72-439(3) provides that it is the last such employer, or its insurer, who is liable to the claimant. *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005).

#### **Out of and in Course of Employment.**

Where the claimant broke his leg during an altercation with another employee wholly disconnected with the claimant's employment or his employer's business, the injury did not arise out of and in the course of the claimant's employment. *Cahala v. Ok Tire Store*, 112 Idaho 1020, 739 P.2d 319 (1987).

A claimant's employment need not be the only cause of disability, but rather that the job must have contributed to the disability. *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987).

An act done partly for personal reasons and partly to serve an employer is still within the scope of employment. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

Where in order to arrest deputy sheriff who was a former Green Beret and a martial arts expert police department notified deputy that he should report for duty at the sheriff's office and when he appeared there they attempted to arrest him during which procedure he pulled his gun and aimed it at fellow police officers who then opened fire killing deputy, since he was not performing any duty that he was employed to perform at the time he incurred the fatal injury his death did not occur in the course of his employment and since there was not a causal connection between his death and the work he was required to perform as a deputy his death did not arise out of his employment and thus since these findings were supported by competent evi-

dence Commission properly denied his widow's claim for death benefits. *Kessler ex rel. Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997).

Where there was no direct evidence concerning where employee-claimant and two crew members were going when the accident occurred and this left the Commission with the task of assessing the available circumstances evidence of (1) the employee trying unsuccessfully to buy additional beer at the lodge; and (2) when the accident occurred the car was headed towards both the camp site as well as two establishments where alcohol could be purchased, there was substantial and competent evidence to support Commission's finding that the employee and crew members were on their way to purchase alcohol and thus the accident did not arise out of and in the course and scope of employment. *Mondragon v. A & L Reforestation, Inc.*, 130 Idaho 305, 939 P.2d 1384 (1997).

Where employer argued that employee's job of reaching across a conveyor belt did not place her at greater risk for injury than her daily routine, the commission's refusal to utilize a greater risk analysis in reaching its holding was proper. The employee met her burden by establishing that she sustained an injury that resulted from an accident that arose out of and in the course of her employment. *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002).

#### **—Accidents Covered.**

Injuries that a smelter plant employee suffered when zinc in an uncovered pot unexpectedly exploded and burned him while he was performing a job task to which he had been assigned were the result of an "accident" which arose out of and in the course of employment. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975).

Where claimant suffered fatal accident during company Christmas party, which was held after regular working hours, such accident occurred within the scope and course of her employment. *Grant v. Brownfield's Orthopedic & Prosthetic Co.*, 105 Idaho 542, 671 P.2d 455 (1983).

Where employee returning to motel at the time of the accident, was discussing business with a co-worker in a company-provided car and while discussing business, the employees had driven downtown to locate the offices of the businesses with which they would be meeting on Monday, the defendant was operating within the course and scope of his employment at the time of the accident. *Kirkpatrick v. Transector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

By smoking while she waited for the product she was to label, the employee may be said to have done an authorized act in a forbidden



manner, but this slight deviation of the employer's rule regulating how the work was to be performed was not enough to deny the employee's claim. Although the injury occurred when the employee jumped off of the rail dock to retrieve her cigarette, the smoking was not the cause of the injury, because the injury could as easily have resulted from the employee jumping off the rail dock to reclaim an earring, necklace or other personal item that had fallen to the ground. *Gage v. Express Personnel*, 135 Idaho 250, 16 P.3d 926 (2000).

#### —Accidents Not Covered.

Where claimant first reported accident at least three months after it allegedly occurred, and claimant indicated to three supervisory personnel that his back injury might have occurred at home rather than in the course of his employment, the evidence was sufficient to support the industrial commission's finding that the claimant failed to establish that he had suffered an accident within the meaning of this section. *Neufeld v. Browning Ferris Indus.*, 109 Idaho 899, 712 P.2d 600 (1985).

Record supported commission's decision that worker failed to sustain his burden of proving that his injury arose out of and in the course of employment with any of the defendants where worker had already been terminated at the time of the alleged back injury and where worker's actions regarding the installation of a water heater were voluntary. *Parker v. Engle*, 115 Idaho 860, 771 P.2d 524 (1989).

#### —Alcohol Withdrawal Seizure.

There was substantial, competent evidence to support the industrial commission's finding that an employee was injured as a result of an alcohol withdrawal seizure and that the workplace did not contribute to his injury. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993).

#### —Causal Link.

Claimant failed to prove by substantial and competent evidence that there was a probable causal link between his back injury and his employment. *Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 866 P.2d 969 (1993).

Plaintiff failed to show that she was injured because of exposure to a risk incident to her employment where the evidence demonstrated that she was injured by being pinned to the side of her employer's building by a truck driven by her companion, and the injury would not have occurred but for the presence of that person at the premises. *Dinius v. Loving Care & More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999).

#### —Idiopathic Fall.

An injury resulting from an idiopathic fall at the workplace does not arise out of employ-

ment and is not compensable under our worker's compensation system without evidence of some contribution from the workplace. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993).

#### —Recreational Activities.

Where school custodian injured his leg playing basketball in the school gym after he had completed his work but before his work shift had ended, his injury did not arise out of or in the course of his employment as required by subsection (17)(a) [now (18)(a)] of this section where recreational activities were not authorized by the employer during work hours, the right to use the gym facilities was not used as an inducement for employment or as compensation to the employees, the employer's policy of allowing employees to use the facilities was for the purpose of employee morale and the employer received no other substantial benefit from such policy, thus the custodian was properly denied workers' compensation benefits. *Teffer v. Twin Falls School Dist.* No. 411, 102 Idaho 439, 631 P.2d 610 (1981).

#### —Street or Highway Risks.

Where the river road to the job site did not present any peculiar difficulty for a driver, the accident which occurred on this road was not covered. *Clark v. Daniel Morine Constr. Co.*, 98 Idaho 114, 559 P.2d 293 (1977).

An employee traveling to and from work is not within the course of his employment and is not covered by workmen's compensation except where travel to and from work involves a special exposure to a hazard or risk peculiarly associated with the employment which is the cause of the injury, and this special risk doctrine only deals with an employee going to and from his work situs. *Ridgway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977).

When an employee's work requires him to travel away from the employer's place of business or his normal place of work, the employee is covered by workmen's compensation while attending to matters such as eating or securing lodging, unless the particular trip represents an unreasonable departure in order to pursue some purely personal activity not connected with his employment or necessary to maintain himself while traveling. *Ridgway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977).

The commission erred in applying the special or peculiar risk doctrine where a claimant was injured traveling to a restaurant while attending a two-week training session operated by his alleged employer. *Ridgway v. Combined Ins. Cos. of Am.*, 98 Idaho 410, 565 P.2d 1367 (1977).

Unless an exception applies, under ordinary circumstances a worker is not in the

course of employment while going to and from an employer's place of business; the reason an employee is generally not awarded compensation for injuries that occur while traveling to and from work is that the employment relationship is considered to be suspended from the time the employee leaves his work to go home until he resumes his work the next day. *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983).

The payment of travel expenses, along with other evidence indicating the employer intended to compensate the employee for travel time, will justify expanding the course of employment to include going to and from work; however, an employee will not be within the course of employment when traveling a route prohibited by the employer. *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983).

Even though the general rule is that an employee is not within the course of employment while traveling to and from work, the concept of "course of employment" is extended when there is a special risk or service incident to the employee's employment involved in his travel. *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983).

The payment of travel expenses is only some evidence that the employer regarded the employee's travel as part of his job. *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983).

Where the employee, who received \$90 per week as a travel allowance for travel between his home and the work site, was killed while traveling from the work site to a dentist appointment, the industrial commission's finding that the employee was not within the course and scope of his employment at the time of the accident was supported by substantial and competent evidence. *Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 719 P.2d 1131 (1986).

Although the claimant was compensated for his travel to the work place, the claimant's accident did not occur within the course and scope of employment where the accident occurred on a route not contemplated by the employment agreement and for which the employer was not paying compensation. *Johnson v. Azteck Elec.*, 110 Idaho 886, 719 P.2d 1146 (1986).

In action for death benefits by wife of employee killed while traveling home from work, evidence supported commission's finding that there was no special risk, in connection with decedent employee's travel to and from work site located 137 miles from his home, which would warrant application of "special risk" exception to general rule that a worker killed or injured while traveling to or from work is not "in the course of employment" and, thus, is not entitled to benefits. *Barker v. Fischbach*

*& Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983).

There was no exception applicable that would remove claimant from the general rule that injuries suffered traveling to work are not covered by worker's compensation, because it was entirely up to the claimant where to park, and claimant opted to park on the public right-of-way for personal, not work-related, reasons. *Freeman v. Twin Falls Clinic*, 135 Idaho 36, 13 P.3d 867 (2000).

### **Peculiar to the Occupation.**

The phrase, "peculiar to the occupation" does not mean that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations. *Bowman v. Twin Falls Constr. Co.*, 99 Idaho 312, 581 P.2d 770 (1978), overruled on other grounds, *Demain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 656 (1999).

### **Personal Services.**

In a case involving personal services, in deciding whether or not the worker is an employee or an independent contractor, the worker's body is not a major item of equipment within the meaning of the third element of the "right to control" test. *Hanson v. BCB, Inc.*, 114 Idaho 131, 754 P.2d 444 (1988).

### **Physicians.**

One who is entitled to diagnose, treat, and correct mental conditions is also competent to testify regarding the causes of such conditions; therefore, a psychologist may testify in an industrial commission proceeding on the issue of causation. *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987).

Chiropractic physicians are recognized and acceptable professionals able to provide treatments for industrial accidents. *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

### **Preexisting Conditions.**

Nothing in this section and §§ 72-437 and 72-439 indicates an intent to require that an employer who employs an employee who comes to the employment with a preexisting occupational disease will be liable for compensation if the employee is disabled by the occupational disease due to an injurious exposure in the new employment. *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 953 P.2d 989 (1998).

Where there was nothing in the industrial commission's order on reconsideration to indicate that the commission abandoned its initial finding that the plaintiff suffered from a pre-existing condition, the award of worker's compensation was reversed. *Demain v.*



Bruce McLaughlin Logging, 132 Idaho 782, 979 P.2d 655 (1999).

There was substantial and competent evidence to support the industrial commission's conclusion that claimant had not provided sufficient evidence to establish that the pain in his neck and arm was the result of his fall at work. *Barrett v. Nampa Fire Dep't*, 134 Idaho 255, 999 P.2d 910 (2000).

### Purpose.

One of the principal requirements of the workmen's compensation law is that insofar as possible the injured workman shall be restored to health by reasonable and proper treatment. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

### Retraining Benefits.

State Insurance Fund (SIF) was not required to pay five percent excise levy to Industrial Special Indemnity Fund (ISIF) on retraining benefits paid to claimant since retraining benefits were "temporary total or temporary partial disability benefits," which were statutorily exempt from levy. *Adams v. Caribou Mem. Hosp.*, 126 Idaho 1022, 895 P.2d 1215 (1995).

### Status of Individual.

Whether an individual is an employee or an independent contractor is an issue that must be decided on a case-by-case approach, with the decision to be reached based upon all the facts and circumstances established by the evidence. *Sines v. Sines*, 110 Idaho 776, 718 P.2d 1214 (1986).

### —Right to Control Test.

The current test for determining whether an individual is an employee or an independent contractor is the "right to control test." The test generally focuses upon consideration of four factors: direct evidence of the right; the method of payment; furnishing major items of equipment; and the right to terminate the employment relationship at will and without liability. *Sines v. Sines*, 110 Idaho 776, 718 P.2d 1214 (1986).

Where the worker was an exotic dancer at a bar, the referee's finding, adopted by the industrial commission, placing emphasis on the fact that the dancers' bodies were major items of equipment was an erroneous application of the "right to control" test to determine whether the worker was an employee or an independent contractor. *Hanson v. BCB, Inc.*,

114 Idaho 131, 754 P.2d 444 (1988).

In determining whether the worker is an employee or an independent contractor, "major items of equipment" under the third element of the right to control test include such things as tools, machinery, special clothing, parts, and other similar items necessary for the worker to accomplish the task to be performed. *Hanson v. BCB, Inc.*, 114 Idaho 131, 754 P.2d 444 (1988).

### Physicians.

Chiropractic physicians are recognized and acceptable professionals able to provide treatments for industrial accidents. *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

### Wages.

Subdivision (9) of § 72-419 clearly contemplates the inclusion of a claimant's earnings from part-time employment in calculating his preinjury wages or income, and since there was no contention that the employer liable for compensation was unaware of the claimant's two part-time positions, the earnings from those part-time positions were properly included by the commission in its determination of the claimant's total preinjury annual income. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

**Cited in:** *Hall v. Young's Dairy Prods. Co.*, 98 Idaho 562, 569 P.2d 907 (1977); *Loughmiller v. Interstate Farmlines*, 107 Idaho 179, 687 P.2d 569 (1984); *Raugust v. Diamond Int'l Corp.*, 107 Idaho 724, 692 P.2d 368 (1984); *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987); *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987); *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990); *Livingston v. Ireland Bank*, 128 Idaho 66, 910 P.2d 738 (1995); *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996); *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997); *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 992 P.2d 164 (1999); *Rivas v. K.C. Logging*, 134 Idaho 603, 7 P.3d 212 (2000); *Stoica v. Pocol*, 136 Idaho 661, 39 P.3d 601 (2001); *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003); *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003); *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005); *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Accident.

—Aggravation of preexisting condition.

—Causal connection.



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### **Accident.**

Federal court is bound by decisions of state Supreme Court construing term "accident." *Sullivan Mining Co. v. Aschenbach*, 33 F.2d 1 (9th Cir.), cert. denied, 280 U.S. 586, 50 S. Ct. 35, 74 l. Ed. 635 (1929).

Injury may have been caused "by accident" although it resulted from the operation of known and usual causes. *Sullivan Mining Co. v. Aschenbach*, 33 F.2d 1 (9th Cir.), cert. denied, 280 U.S. 586, 50 S. Ct. 35, 74 l. Ed. 635 (1929).

Word "accident" was employed in its ordinary sense as meaning an unlooked for and untoward event which was not expected or designed. *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921); *Aldrich v. Dole*, 43 Idaho 30, 249 P. 87 (1926); *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929).

Nothing more was required than that harm that plaintiff had sustained shall have been unexpected. It was enough that causes themselves known as usual should have produced result which on particular occasion was neither designed nor expected. *Aldrich v. Dole*, 43 Idaho 30, 249 P. 87 (1926).

Even in view of liberal construction of statute, it was not enough for applicant to say that accident would not have happened if he had not been engaged in particular employment, or if he had not been at particular place. He must go further and say that accident arose because of something he was doing in course of his employment and because he was exposed by nature of his employment to

some particular danger. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927).

Where hernia appeared suddenly and immediately following injury sustained while employee was operating road grader, compensation was properly awarded. *In re Hillhouse's Estate*, 46 Idaho 730, 271 P. 459 (1928).

Statute does not speak of accident as separate and distinct thing to be considered apart from its consequences, but word "accident" is introduced to qualify word "injury." *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929).

While an accident may have been slight and the untoward circumstances meager, there must have been some distinctive unexpected happening. *Croy v. McFarland-Brown Lumber Co.*, 51 Idaho 32, 1 P.2d 189 (1931); *Walters v. Weiser*, 66 Idaho 615, 164 P.2d 593 (1945).

The law did not exact certainties, it acted upon probabilities. It was sufficient to establish an accident and the time thereof, with reasonable probability. *Riley v. Boise City*, 54 Idaho 335, 31 P.2d 968 (1934); *Wozniak v. Stoner Meat Co.*, 57 Idaho 439, 65 P.2d 768 (1937); *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937); *Nistad v. Winston Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938).

The court would not place a narrow or hypercritical construction upon this section in determining what injuries were "accidents" or "occupational diseases." *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1938).

To be an accident, it need not have occurred at one instant, but there may have been repetitious causes all relatively slight which culminated and resulted in as serious and fatal an injury as though the disabling or lethal blow or incident occurred at one time. *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1938). But see *Goasland v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

Hernia, as injury neither expected nor designed, was compensable, notwithstanding lack of evidence of any slip, wrench or sudden jerk. *Cook v. Winget*, 60 Idaho 561, 94 P.2d 676 (1939); *Hieronymus v. Stone's Food Stores*, 60 Idaho 727, 96 P.2d 435 (1939).

In order to sustain an award for a hernia, where the evidence showed that the employee had resumed his work about in the same manner as which he had theretofore done, it was not necessary that there should be any evidence of any slip, wrench or sudden jerk. *Hieronymus v. Stone's Food Stores*, 60 Idaho 727, 96 P.2d 435 (1939).

It was not an easy task for the board or the court, to always discern the exact dividing line beyond which an incident or happenstance became sufficiently definite and localized as to time, place and circumstance, that it may have been legally designated an accident; the difficulty of the task, however, instead of relieving the board or court of the duty, rendered it the more imperative that the duty be discharged with sound discrimination. *Hoffman v. Consumers Water Co.*, 61 Idaho 226, 99 P.2d 919 (1940).

An injury received by an employee was none the less an accident because he was doing the work he was expected to do, and in the manner contemplated and it was not necessary, where an employee was injured and received a stroke by reason of the performance of his duties, that he should have slipped or fallen, or that some machinery or other equipment had failed. *Pinson v. Minidoka Hwy. Dist.*, 61 Idaho 731, 106 P.2d 1020 (1940).

Where the industrial accident board found that the stroke, with which the employee was suffering at a stated time, was the result of his lifting and straining on a drill which had become stuck in a hole, and was personal injury by accident arising out of, and in the course of, his employment, that was sufficient as a finding that the injury occurred within the scope of the employment by accident. *Pinson v. Minidoka Hwy. Dist.*, 61 Idaho 731, 106 P.2d 1020 (1940).

An "accident" occurred in doing what the workman habitually did, if any unexpected, undesigned, unlooked-for or untoward event or mishap, connected with, or growing out of, the employment took place. *Pinson v. Minidoka Hwy. Dist.*, 61 Idaho 731, 106 P.2d 1020 (1940); *Laird v. State Hwy. Dep't*, 80

Idaho 12, 323 P.2d 1079 (1958).

Death was not in itself an "accident" within the statutory definition in the compensation law, though often the result of an accident. *Wade v. Pacific Coast Elevator Co.*, 64 Idaho 176, 129 P.2d 894 (1942).

Death of workman in his lodging as result of heart attack sustained upon his return from evening meal was not due to accident. *In re Carrie*, 73 Idaho 503, 254 P.2d 410 (1953).

Sudden death of able-bodied employee while doing light work in normal course of his employment was not compensable where board made no finding as to cause of death, since sudden death in itself is not an accident. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

An accident is an unexpected, undesigned and unlooked-for mishap happening suddenly and connected with the employment and definite in time and place of occurrence. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953); *Welch v. Safeway Stores, Inc.*, 87 Idaho 396, 393 P.2d 594 (1964).

The Workmen's Compensation Law as adopted in 1917 did not contain a definition of the term "accident." *Lewis v. Department of Law Enforcement*, 79 Idaho 40, 311 P.2d 976 (1957).

On claim made by widow and minor daughter before the board for death benefits, claiming deceased's death was caused by an accident received in, arising out of and in the course of his employment the evidence did not support a finding of accidental personal injury causing death, but that death was caused by a cerebral hemorrhage due to a vascular arteriosclerotic disease. *Darvell v. Wardner Indus. Union*, 78 Idaho 309, 302 P.2d 950 (1956).

Where the board had no substantial competent evidence, it was error to find against employer's surety for 1955 that an exacerbation in 1955 was the result of an accident in that year, rather than as a result of an injury to claimant prior to 1955. *Beard v. Post Co.*, 82 Idaho 38, 348 P.2d 939 (1960).

#### —Aggravation of Preexisting Condition.

Acceleration or aggravation of latent physical defect, aneurysm, resulting from a not unusual strain in lifting tackle into wagon and attempting to put burr on bolt, was held an accident. *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929).

Regardless of preexisting conditions, if disability was precipitated by accident arising out of employment, and if disability probably would not have arisen except for accident, statute contemplated full compensation. *Strouse v. Hercules Mining Co.*, 51 Idaho 7, 1 P.2d 203 (1931).

Where employee knowing he had a weak heart continued work for ten days after contracting influenza, left sickbed to attend a



meeting, and died three days later of rheumatic heart disease complicated by influenza, there was no compensable "accident." *Walters v. Weiser*, 66 Idaho 615, 164 P.2d 593 (1945).

Where nature of work was such that a workman, either in normal health or with some latent weakness over a period of time, injured himself in unforeseen way and some final act caused the flareup that brought about outward evidence of injury, caused by a single untoward event or a series of untoward events, workman suffered an injury resulting from an accident which was compensable if done in the course of and arising out of employment. *Walters v. Weiser*, 66 Idaho 615, 164 P.2d 593 (1945).

Where the board had no substantial competent evidence, it was error to find against employer's surety for 1955 that an exacerbation in 1955 was the result of an accident in that year, rather than as a result of an injury to claimant prior to 1955. *Beard v. Post Co.*, 82 Idaho 38, 348 P.2d 939 (1960).

Evidence that a deputy sheriff with pre-existing essential hypertension with atherosclerosis suffered a fatal stroke as a result of physical exertion and emotional strain in performing his duties at the scene of an accident supported a finding that the deputy died as a result of an accident arising out of and in the course of his employment. *Hammond v. Kootenai County*, 91 Idaho 208, 419 P.2d 209 (1966).

#### —Causal Connection.

There must have been a causal connection between a strain occasioned by the work being done and the resulting injury. The proof must have shown that the strain was the cause or a contributing cause of the injury before a recovery could have been had. *Lewis v. Department of Law Enforcement*, 79 Idaho 40, 311 P.2d 976 (1957).

The evidence introduced by respondent that his affliction of pulmonary tuberculosis was accidentally caused or aggravated by exposure to silica dust was insufficient to support the theory of personal injury caused by an accident arising out of and in the course of his employment. *Flasche v. Bunker Hill Co.*, 83 Idaho 420, 363 P.2d 1024 (1961).

Claimant was required to establish a probable, not merely a possible, connection between cause and effect to support his contention that he suffered a compensable accident. *Davenport v. Big Tom Breeder Farms, Inc.*, 85 Idaho 604, 382 P.2d 762 (1963).

A compensation claimant that the burden of proving that he received a personal injury caused by an accident arising out of and in the course of his employment. *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).

An injury did not arise out of and in the

course of employment where the injury received could not be fairly traced to the employment as a contributing proximate cause. *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).

As a general rule where an employee was assaulted and injury was inflicted upon him through animosity and ill will arising from some cause wholly disconnected with the employer's business or the employment the employee could not recover compensation simply because he was assaulted when he was in the discharge of his duties. *Duerock v. Acarregui*, 87 Idaho 24, 390 P.2d 55 (1964).

Where employee of a saw mill had a seventeen year history of asthmatic illness his claim for "asthmatic bronchitis" was properly denied when he was unable to show a work-related, causative event or mishap which was essential to making a *prima facie* case for a recoverable injury. *Manning v. Potlatch Forests, Inc.*, 93 Idaho 855, 477 P.2d 97 (1970).

A claimant who had a laminectomy in the fall of 1967 to remove a disc protrusion from his spine was unable to show a strong and probable causal linkage between back pains suffered in 1966 while working and a work-connected accidental fall from a truck which resulted in a sprained ankle early in 1967. *Kern v. Shark*, 94 Idaho 69, 480 P.2d 915 (1971).

#### —Disease.

It was held, under evidence of case, that stroke of paralysis did not result from compensable accident. *Larson v. Ohio Match Co.*, 49 Idaho 511, 289 P. 992 (1930).

An employee of a training school who contracted undulant fever while working with cows was compensable as it was not customary or usual result of such work. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

Claim was denied where the evidence sustained a finding that cancer caused the death of the employee and that a cancer was not caused or aggravated by an injury sustained while working for his employer. *Smith v. White Pine Lumber Co.*, 53 Idaho 808, 27 P.2d 965 (1933).

That claimant engaged in spraying and dusting with powdered sulphur fields of growing peas by means of a hand-operated blower, and subsequently suffered from bronchiectasis, was sufficient evidence to warrant compensation. *Bybee v. Idaho Equity Exch.*, 57 Idaho 396, 65 P.2d 730 (1937).

Lead poisoning of lead burner after three weeks' exposure was held injury by accident and not occupational disease. *Ramsay v. Sullivan Mining Co.*, 51 Idaho 366, 6 P.2d 856 (1931); *Woznick v. Stoner Meat Co.*, 57 Idaho 439, 65 P.2d 768 (1937).

A dairy worker who contracted streptococ-



cus pneumonia from going from a heated room to a refrigerator was not compensable as there was no injury resulting from an accident shown. *Sonson v. Arbogast*, 60 Idaho 582, 94 P.2d 672 (1939).

Where a laborer contracted typhoid fever while cleaning an irrigation ditch, and there was no proof of an accident or an injury resulting from an accident, compensation was denied. *Hoffman v. Consumers Water Co.*, 61 Idaho 226, 99 P.2d 919 (1940).

Pleurisy contracted as a result of exposure was not under the circumstances an "accident." *Stevens v. Driggs*, 65 Idaho 733, 152 P.2d 891 (1944).

Death from coronary occlusion, as result of ball of fire passing before eyes of employee in explosion of transformer held death by accident, since "violence to physical structure of the body" occurred as result of a shock, even though there was no physical contact of the ball of fire with the body. *Roberts v. Dredge Fund*, 71 Idaho 380, 232 P.2d 975 (1951).

Finding of board of adequate ventilation, absence of dust, and no sudden or fortuitous incident bars recovery of claimant for compensation for disability from tuberculosis as the result of an accident. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952).

### —Illustrated.

Injury to painter, resulting in total disability in course of a little over a week, from poisonous gas given off by carbon disulphide thinner, was held "by accident" and not an occupational disease. *Sullivan Mining Co. v. Aschenbach*, 33 F.2d 1 (9th Cir.), cert. denied, 280 U.S. 586, 50 S. Ct. 35, 74 L. Ed. 635 (1929).

Injury to truck driver resulting from cumulative effect of continuous pressing against shift-lever made necessary by worn gears, and lever repeatedly striking against knee, was "by accident." *Aldrich v. Dole*, 43 Idaho 30, 249 P. 87 (1926).

Accident of employee crossing railroad track 200 feet from plant gate was compensable since there was a causal relationship between the work and the hazard, and *State ex rel. Gallet v. Clearwater Timber Co.*, 47 Idaho 295, 274 P. 802 (1929), is expressly overruled. *Jaynes v. Potlatch Forests, Inc.*, 75 Idaho 297, 271 P.2d 1016 (1954).

Injury to superintendent of mining company suffered while splitting wood for preparation of evening meal did not arise out of and in course of employment, although company furnished claimant with wood and dwelling. *Stewart v. St. Joseph Lead Co.*, 49 Idaho 171, 286 P. 927 (1930).

Where an employee received a chest injury in the course of his employment by falling timber and soon thereafter developed pneumonia and died a week after the accident, the

widow was entitled to compensation. *Suren v. Sunshine Mining Co.*, 58 Idaho 101, 70 P.2d 399 (1937).

Where the cook fell while engaged in work at a cafe, the evidence warranted a finding and an award of compensation for sacroiliac injury by accident, arising out of, and in the course of, her employment. *Golay v. Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939).

Bursitis to knee of carpenter, caused by sliding knee along floor he was finishing, was not compensable, since it was not due to an accident, but was caused by persistent and continuous bruising over a period of time. *Carlson v. Batts*, 69 Idaho 456, 207 P.2d 1023 (1949).

Personal injury included an injury caused by accident which resulted in violence to the physical structure of the body, and such nonoccupational diseases resulting directly from the injury. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

Claimant suffered a compensable accident when, while stooping under a counter to get a package for a customer, she experienced a sudden sharp pain in her low back necessitating in time an operation to remove a herniated disc, she having performed duties of lifting heavy bolts of cloth to shelves in the department store where she was employed previous to such injury. *Harding v. Idaho Dept Store*, 80 Idaho 156, 326 P.2d 992 (1958).

Award to claimant for heart injury, sustained by him while driving a school bus over rough snowy roads which entailed extra precautions and exertion, by the industrial accident board was sustained on appeal, it being held to be an accident under the compensation law. *Whipple v. Brundage*, 80 Idaho 193, 327 P.2d 383 (1958).

Two back injuries resulting from stooping to lift a tub of tavern sewage and stooping to lift a box of empty bottles, respectively, were accidents notwithstanding claims by the respective employers that such incidents lacked distinctive, unexpected happenings. *Dawson v. Hartwick*, 91 Idaho 561, 428 P.2d 480 (1967).

### —Injury.

Where claimant, employed to work around cedar lumber, knew that he was susceptible to cedar poisoning, an attack of cedar poisoning cannot be called personal injury by accident. *Reader v. Milwaukee Lumber Co.*, 47 Idaho 380, 275 P. 1114 (1929).

The words "injury" and "accident," as used in the Workmen's Compensation Law, are not synonymous; it may well be that an injury was by accident, which fact is to be determined by the board. *Smith v. Mercy Hosp.*, 60 Idaho 674, 95 P.2d 580 (1939).

Although hard work was not an "accident"

nor "injury," within the meaning of the Workmen's Compensation Law, yet it may have augmented or accelerated injurious results of an accident. *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

The finding of the industrial accident board was sustained by the evidence that the sudden, frightening event to which respondent was subjected, caused or was a causative factor in precipitating the personal injury, i.e., the cerebral hemorrhage by which respondent became afflicted within a comparatively short time after the happening of said event, namely the narrow escape of collision with another car; and having caused or been the causative factor of the injury, such event constituted an accident. *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957).

Relative to the definition of an accidental personal injury, an emotional shock, though it be a sudden, untoward and unforeseen event, could not constitute an accident unless such event caused or was causative of a resulting personal injury. *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957).

Where policeman on required firing range and while running from station to station, at one station suffered a stroke, becoming afflicted with a congenital aneurysm of the left intra-cranial carotid artery causing him to suffer permanent injuries including a partial paralysis of his limbs on the right side, brought proceeding for compensation, a finding was required that there had been an industrial accident. *Lewis v. Department of Law Enforcement*, 79 Idaho 40, 311 P.2d 976 (1957).

Where wife filed a claim under the workmen's compensation act for loss of consortium due to injuries suffered by her husband such claim was properly denied as the claim arose out of husband's personal injuries which had already been compensated for under the Workmen's Compensation Law. *Coddington v. Lewiston*, 96 Idaho 135, 525 P.2d 330 (1974).

#### —Overexertion.

Where employee's cerebral hemorrhage, causing his death, was produced by a strain while he was attempting to put an ore car back on the tracks, his dependents were entitled to compensation. *Fealka v. Federal Mining & Smelting Co.*, 53 Idaho 362, 24 P.2d 325 (1933).

The evidence was amply sufficient to establish that the employee died from a ruptured aneurysm, due to increased blood pressure caused by the exertion required by the performance of the duties of his employer, instead of a coronary disease unconnected with the employment. *Evans v. Cavanagh*, 58 Idaho 324, 73 P.2d 83 (1937).

Where the evidence showed that the claimant was an able-bodied man, although suffer-

ing with arteriosclerosis, and that he suffered a sudden impairment of the circulation of his left leg by the cramped, strenuous position in which he was obliged to work, and that this cramped position caused a swelling of the walls of the larger blood vessels, and possibly small blood vessels, and that the circulation was immediately cut off, which brought more swelling and inflammation, and blood clots formed to such an extent that the circulation was so substantially impaired in the left leg below the knee that gangrene resulted, and that the leg did not respond to treatment and amputation was necessary, it was sufficient to sustain a finding that the plumber had suffered a compensable accident arising out of, and in the course of, his employment. *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

The evidence supported a finding that the death of a miner by coronary thrombosis and overexertion while working in a mine containing such bad air and having such poor ventilation, that the men were perspiring, was an accident and compensable. *Aranguena v. Triumph Mining Co.*, 63 Idaho 769, 126 P.2d 17 (1942).

Claim denied where the workman died suddenly and unexpectedly, while performing relatively easy work and doing what he habitually did. *Kaonis v. Ohio Match Co.*, 64 Idaho 89, 127 P.2d 776 (1942).

Evidence was sufficient to sustain a finding that the lifting and moving of a piano increased blood pressure and was a factor in precipitating coronary occlusion and that such was an accident arising out of and in the course of the employee's employment. *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

Where truck driver's death from coronary occlusion was precipitated by exertion in loading ice cream packages on truck which aggravated or accelerated a previous diseased condition of employee's heart, his dependents were entitled to compensation. *Teater v. Dairymen's Co-op Creamery*, 68 Idaho 152, 190 P.2d 687 (1948).

Coronary occlusion sustained by miner, as result of energy expended in helping to lift a tipped up car held due to an accident, even though intoxication may have contributed in some degree to the injury sustained. *In re Smith*, 72 Idaho 8, 236 P.2d 87 (1951).

Sudden death of welder while climbing a ladder, which was unexplained, though probably due to coronary occlusion, was not due to accident, as welder though engaged in strenuous work was performing the usual, ordinary, and customary work of his occupation. *Dunn v. Morrison-Knudsen Co., Inc.*, 74 Idaho 210, 260 P.2d 398 (1953).

If the claimant had been engaged in his ordinary, usual work and a strain of such labor became sufficient to overcome a resis-



tance of claimant's body and caused an injury, such injury was compensable. And although claimant was suffering from a preexisting defect such as aneurysm, if a strain aggravated and accelerated the condition and caused or contributed to the injury, the injury was compensable. *Lewis v. Department of Law Enforcement*, 79 Idaho 40, 311 P.2d 976 (1957).

Deceased sustained a personal injury, i.e., the coronary attack, resulting in bodily damage, therefore the requirement of injury which resulted in violence to the physical structure of the body was met, such injury being caused by an event, or stated conversely, an event resulting in his injury. The event constituted the end result of stress and strain under the related circumstances, — the acceleration of the heart condition, which constituted the precipitating factor of the coronary injury. *Laird v. State Hwy. Dep't*, 80 Idaho 12, 323 P.2d 1079 (1958).

### Employees.

Payment of premiums on an individual for workmen's compensation coverage is proper evidence indicative of his status as employee. *Hansen v. Rainbow Mining & Milling Co.*, 52 Idaho 543, 17 P.2d 335 (1932); *State ex rel. Wright v. Brown*, 64 Idaho 25, 127 P.2d 791 (1942).

Right of discharge was one of strong indications that relation was one of employment. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923).

Independent contractor did not have status of employee of person with whom he contracted. *E. T. Chapin Co. v. Scott*, 44 Idaho 566, 260 P. 172 (1927).

Statement submitted by an employer to the state insurance fund, for the purpose of computing premiums, wherein such statements reported that there were no contractors or subcontractors, made a prima facie case that a newspaper carrier was a servant and not an independent contractor. *Joslin v. Idaho Times Publishing Co.*, 60 Idaho 235, 91 P.2d 386 (1939).

Where the deceased had been furnished with axes, wedges, and sawing tools, and directed to cut timber on a designated strip of land for a compensation of one dollar per thousand board feet, the deceased was an "employee," not an "independent contractor," within the meaning of the statute authorizing the state to recover \$1,000 for the industrial administration fund on the death of an employee who left no dependents. *State ex rel. Wright v. Brown*, 64 Idaho 25, 127 P.2d 791 (1942).

A workman employed by a subcontractor digging sewer trenches for a general contractor building sewers for a city was an employee of the general contractor and not of the city

and the general contractor was answerable rather than the city for the death of the workman in the course of his employment through the negligence of the subcontractor and the heirs could not maintain an action other than that provided by the Workmen's Compensation Law against the general contractor. *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

Trucker hired by lumber company to assist contract haulers during busy season, who was paid by the week, and who was directed where to go and what to do, was an employee of the lumber company. *Nixon v. Webber-Riley Lumber Co.*, 71 Idaho 238, 229 P.2d 997 (1951).

Printed "report of employer" which listed claimant as an employee was a factor to consider in determining relationship of parties. *Wilcox v. Swing*, 71 Idaho 301, 230 P.2d 995 (1951).

The fact that the work was to be done under directions and to the satisfaction of certain persons representing the principal, did not render the person contracted with to do the work a servant. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

The retained right of discharge of the worker, or the right of either party to terminate the relationship without liability to the other party, was construed to be a strong — perhaps the strongest and most cogent — indication of retention of the power to control and direct the activities of the worker and thus to control detail as to the manner and method of performance of the work. *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963).

Where office manager was not an officer of the corporation, was compensated once a week upon amount of sales of himself and other employees, and where he was killed while outside the state of Idaho while in the course of his employment, he was an employee within the provisions of this act. *Heck v. Dow, Inc.*, 93 Idaho 377, 461 P.2d 717 (1969).

### —Loaned Employees.

Negligence action brought by widow and surviving child of deceased employee who was electrocuted while assisting in the installation of an electric transmission line was precluded since deceased met his death while engaged in the reconductoring of transmission lines, a necessary and customary part of a business conducted by appellee power company and therefore even though he was an employee of an independent contractor working on electric power company's land he was an employee of the power company within the compensation statute. *Beedy v. Washington Water Power Co.*, 238 F.2d 123 (9th Cir. 1956).

Where an employee worked under the di-



rect control of another, and at the time of the accident he was furthering the affairs of such other, in that event such other became his temporary employer and liable for workmen's compensation, and this was true in a case where an employee of the federal reclamation service was the one doing the work. *Pinson v. Minidoka Hwy. Dist.*, 61 Idaho 731, 106 P.2d 1020 (1940).

Although contract with timber protective association authorized the association to borrow employees for fire fighting activities, an employee of logging operator who was sent to fight fire and was killed while driving to the fire was the employee of the logging operator and not a loaned employee of the protective association since the association had no control over his activities until he reported to the association. In *re Sines*, 82 Idaho 527, 356 P.2d 226 (1960).

In determining whether the employer of a workman was his original employer or the party to whom he had been loaned, when such workman came under the direction and control of the person to whom his services had been furnished, the latter became his temporary employer. In *re Sines*, 82 Idaho 527, 356 P.2d 226 (1960).

#### **Employer.**

Section providing that an "employer" includes "the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on" did not apply to the United States engaged in a flood control project carried on by general contractors, since the United States though doing some supervision was not "carrying on a business." *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956).

Test was whether one for whom work was done was virtually proprietor or operator of work carried on. In *re Fisk*, 40 Idaho 304, 232 P. 569 (1925).

It was not necessary that control be exercised, if the right to control existed. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

The test of whether or not the owner of property was an employer was whether such owner was the virtual operator of the business, either for pecuniary gain or development of property. *Jones v. Packer John Mines Corp.*, 60 Idaho 653, 95 P.2d 572 (1939).

While there was some conflict in the authorities, it was a well-established rule to the effect that the question of the identity of the person who paid compensation was not controlling and was not a circumstance which was decisive or determinative of the question whether a person to whom an employee was lent, became his employer. *Pinson v. Minidoka Hwy. Dist.*, 61 Idaho 731, 106 P.2d 1020 (1940).

A lumber company furnishing most of the materials for the construction of a dwelling, advancing some money to an uninsured contractor, but not inducing any one to believe that the company was the employer of the workmen engaged by the contractor, or that the company had any interest in the construction of the dwelling, was not "estopped" to deny that it was the employer of the contractor's workmen so as to impose liability for compensation on the company. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

Where oil company exercised discretion and control over employee of lessee of premises owned by former during absence of latter, it was properly held that both the oil company and lessee were employers of injured employee. *Moser v. Utah Oil Ref. Co.*, 66 Idaho 710, 168 P.2d 591 (1944).

The statutory provision that "the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be on the part of the surety," was included among those provisions which must be read into all contracts of workmen's compensation insurance. "Employer" included his surety so far as applicable. *Larson v. State*, 79 Idaho 446, 320 P.2d 763 (1958).

Statute defining employer within Workmen's Compensation Law as "... any body of persons, corporate or unincorporated ..." was broad enough to include a partnership. *Carter v. Carter Logging Co.*, 83 Idaho 50, 357 P.2d 660 (1960).

The statutory relationship of employer and employee existed, not by reason of any element of control, but simply because the statute established the relationship under the proper factual situation. *Adam v. Titan Equip. Supply Corp.*, 93 Idaho 644, 470 P.2d 409 (1970).

Where defendant, owner of a large phosphate ore producing plant, determined that construction maintenance work should be performed on various buildings at the plant and contracted with a construction company to do this work, and as work progressed, defendant decided that certain holes in walls of a transformer vault, a building containing a substantial quantity of very high voltage and amperage electrical equipment, should be patched by masonry construction rather than reinforced concrete as originally planned, and in order to have this and other masonry work done, the construction company orally contracted with a mason, who in turn employed plaintiff, who was injured as a result of an accident, defendant was plaintiff's employer and plaintiff's only remedy was under workmen's compensation. *Miller v. FMC Corp.*, 93 Idaho 695, 471 P.2d 550 (1970).

#### **—Proprietor or Operator.**

In a diversity action against phosphate producer by employee of subcontractor to recover

for personal injuries sustained in the construction of a furnace where there was no showing that the owner of the plant normally did that kind of construction, the assembly of the furnace was the construction business of the subcontractor, and the phosphate producer was not immune from tort liability since he was not the virtual proprietor or operator of such construction business. *Ray v. Monsanto Co.*, 420 F.2d 915 (9th Cir. 1970).

Proprietor's liability extends only to injuries sustained while working in proprietor's business under his contract. Construction partnership employing contractor was not liable for contractor's truck driver's fatal injury while on errand for contractor. *Palmer v. J.A. Terteling & Sons*, 52 Idaho 170, 16 P.2d 221 (1932).

Evidence in the cited case was insufficient to show that the corporation was virtually operator of business of a mine, either for pecuniary gain or development of property and was, therefore, not the claimant's employer within the meaning of the Workmen's Compensation Law. *Jones v. Packer John Mines Corp.*, 60 Idaho 653, 95 P.2d 572 (1939).

In order to hold as an "employer," the owner or lessee of premises or other person who was not the direct employer of the workmen employed thereon, it must have been shown that such owner, lessee, or other person was the proprietor or operator of the business carried on on such premises. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943); *McGee v. Koontz*, 70 Idaho 507, 223 P.2d 686 (1950).

Where one sold a saw mill on a conditional sales contract, secured the money owed by a chattel mortgage, and received part payment from the produce of the machinery sold, and exercised no control over the business, and had no interest in the enterprise except as a creditor, he was not a proprietor or operator of the business conducted by the purchaser. *McGee v. Koontz*, 70 Idaho 507, 223 P.2d 686 (1950).

### **Employer-Employee Relationship.**

Where a supervising architect for a school district was injured while making an inspection of the work, he was not an employee of the contractor and, therefore not covered by the Workmen's Compensation Law defining a workman and by its provisions for the adoption of minimum safety standards for the protection of employee workmen. *Pehrson v. C.B. Lauch Constr. Co.*, 237 F.2d 269 (9th Cir. 1956).

Proprietor and surety may have been liable even though workman was employed by and worked under direction of independent contractor, provided work being done at time of injury was part of particular business carried on by proprietor. *In re Fisk*, 40 Idaho 304, 232 P. 569 (1925).

The general test was the right to control and direct the activities of the employee, or the power to control the details of work to be performed, and to determine how it should have been done and whether it should stop or continue, that gave rise to the relationship of employer and employee, and where the employee came under the direction and control of the person to whom his services had been furnished, the latter became his temporary employer and liable for compensation in the event of injury or death. *Pinson v. Minidoka Hwy. Dist.*, 61 Idaho 731, 106 P.2d 1020 (1940).

The section of the compensation act making an "employer," who was subject to the provisions of the act, liable for compensation to an employee of a contractor or subcontractor under such employer, did not apply to an owner of premises on which a dwelling was being constructed, who had no right of control over the laborers directly employed by an uninsured contractor, and who was not an employer, within the meaning of the section of the act defining employer. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

Any doubt as to whether a claimant was an employee or an independent contractor must have been determined in favor of employer-employee relationship. *Fitzen v. Cream Top Dairy*, 73 Idaho 210, 249 P.2d 806 (1952).

Where limited evidence on issue as to right of control led to but one rational conclusion, to-wit that defendant not only had the right to control the details of work performed, but in certain respects did direct details of the work, an employer-employee relationship existed. *Fitzen v. Cream Top Dairy*, 73 Idaho 210, 249 P.2d 806 (1952).

Watchman hired by floathouse owners could not be counted with employees of any floathouse owner's business, since he was an employee of unorganized floathouse owners. *Doyal v. Hoback*, 75 Idaho 431, 272 P.2d 313 (1954).

Deputy brand inspector had no power or authority to employ livestock trucker to help him inspect brands where he, under his appointment, was required to do this work and trucker was not an employee of the state for purposes of workmen's compensation. *Seward v. State Brand Div.*, 75 Idaho 467, 274 P.2d 993 (1954).

Independent livestock trucker who was injured while gratuitously and voluntarily aiding deputy brand inspector inspect brands was not a servant to any one as he was self-employed and he did not come within the doctrine of the loaned servant rule for the purposes of Workmen's Compensation Act. *Seward v. State Brand Div.*, 75 Idaho 467, 274 P.2d 993 (1954).

There must have been a relationship of employer and employee before Workmen's



Compensation Act applied and services gratuitously and voluntarily performed for the employee of an employer were, subject to certain exceptions, not covered. *Seward v. State Brand Div.*, 75 Idaho 467, 274 P.2d 993 (1954).

Relationship of employer and employee may have arisen out of either the express or implied contract. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

Where the railroad under its existing contract with the stockyards company could have declared any agent or employee of the stockyards company relieved from further service at the stockyards facility, it was in effect operating the stockyards at the time of claimant's death by electrocution under a service contract through a controlled agent and, therefore, being a statutory employer, was exempt from tort liability. *Russell v. Idaho Falls*, 78 Idaho 466, 305 P.2d 740 (1956).

While payment of services constituted a circumstance in determining the direct employer, such was not controlling of the relationship; general test was the right to control and direct the activities of the employee. In *re Sines*, 82 Idaho 527, 356 P.2d 226 (1960).

Award of compensation depended on the existence of employer-employee relationship which relationship depended upon a contract of hire, either express or implied. In *re Sines*, 82 Idaho 527, 356 P.2d 226 (1960).

Determination must have been made by the district court first whether timber association was the statutory employer of a young man who was an employee of the district created by the state forester working directly under the control and direction of the fire warden who had hired him, before a determination could be made that the district court was without jurisdiction under the Workmen's Compensation Act to entertain a negligence action for the death of the youth against the association, the right of appeal being such an adequate remedy of law from the judgment of the district court that a writ of prohibition would not issue. *Clearwater Timber Protective Ass'n v. District Court*, 84 Idaho 129, 369 P.2d 571 (1962).

Supervision or control was not an essential element of the statutory relationship of employer and employee under the statute. *Miller v. FMC Corp.*, 93 Idaho 695, 471 P.2d 550 (1970).

### **Illegitimacy of Child.**

Fact that child of deceased employee was illegitimate was not conclusive as to such child's right to compensation. *Rodius v. Coeur d'Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

### **Independent Contractors.**

Acceptance of the owner's interpretation of the specifications, quality control over the materials used, workmanlike performance, time requirements, and safety standards

were matters over which an owner ordinarily exercised a considerable amount of supervision without intending to assume proprietary or operating control of the independent contractor's construction business, and therefore supervisory control of this kind did not transpire what would ordinarily have been the construction business of the independent contractor into the business of the owner, nor vest in the owner a proprietary interest in, or operating control of, that construction business. *Ray v. Monsanto Co.*, 420 F.2d 915 (9th Cir. 1970).

Whether one was an employee of another or an independent contractor was to be determined from all facts and circumstances established by evidence. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923); *Horst v. Southern Idaho Oil Co.*, 49 Idaho 58, 286 P. 369 (1930); *Hansen v. Rainbow Mining & Milling Co.*, 52 Idaho 543, 17 P.2d 335 (1932); *Nistad v. Winton Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938); *O'Niel v. Madison Lumber & Mill Co.*, 61 Idaho 546, 105 P.2d 194 (1940); *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

Vital question in determining whether person was independent contractor or mere servant was control over work which was reserved by employer. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923); *Wilcox v. Swing*, 71 Idaho 301, 230 P.2d 995 (1951); *Fitzen v. Cream Top Dairy*, 73 Idaho 210, 249 P.2d 806 (1952); *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960); *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963).

Mode of payment was not decisive test by which to determine question. Test laid in question whether contract reserved to proprietor power of control over employee. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923); In *re Black*, 58 Idaho 803, 80 P.2d 24 (1938), overruled on other grounds, *Hite v. Kulhenak Bldg. Contractors*, 96 Idaho 70, 524 P.2d 531 (1974).

Independent contractor was one who, in rendering services, exercised an independent employment or occupation and represented his employer only as to the results of his work, and not as to the means whereby it was to be accomplished. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923).

Person loading lumber on cars at a price per running foot, furnishing his own equipment, and assuming responsibility for demurrage, was independent contractor. *E. T. Chapin Co. v. Scott*, 44 Idaho 566, 260 P. 172 (1927).

Filling station owner, injured while building oil rack in storage plant of oil company under contract by which company was to furnish gasoline from plant to filling station, was an independent contractor. *Horst v.*



Southern Idaho Oil Co., 49 Idaho 58, 286 P. 369 (1930).

The Workmen's Compensation Law was to be given a liberal construction in favor of the employee, but the rule of liberal construction could not be extended to the point of bringing an independent contractor within the purview of the law. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934); *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937); *In re Black*, 58 Idaho 803, 80 P.2d 24 (1938); *Arneson v. Robinson*, 59 Idaho 223, 82 P.2d 249 (1938); *Stover v. Washington County*, 63 Idaho 145, 118 P.2d 63 (1941); *Flock v. J.C. Palumbo Fruit Co.*, 63 Idaho 220, 118 P.2d 707 (1941); *Strosheim v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941); *Long v. Brown*, 64 Idaho 39, 128 P.2d 754 (1942); *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943); *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946).

In workman's compensation proceeding, evidence that the claimant was employed by a fruit grower to drive a truck in delivering fruit to markets, that he purchased the truck and leased its use to the grower under an arrangement for the payment of day wages to the claimant, and receipt of certain percentage of the truck earnings by the grower, that claimant was injured when the truck was wrecked during a trip to market for the grower with a load of peaches purchased by him, and that the grower retained the right to hire and fire the claimant at any time, and gave specific directions as to such trip so far as possible, warranted a finding that the claimant was not an "independent contractor." *Mulanix v. Falen*, 64 Idaho 293, 130 P.2d 866 (1942).

The chief test, though not wholly decisive, in determining whether one was an independent contractor or an employee, was whether the employer had the right of control as to the mode of doing the work contracted for. *Ohm v. J. R. Simplot Co.*, 70 Idaho 318, 216 P.2d 952 (1950).

Independent contractor relationship between parties was indicated where contract terms placed extension of tunnel under control of claimant. *Wilcox v. Swing*, 71 Idaho 301, 230 P.2d 995 (1951).

If there was a principal-independent contractor relationship, the method of payment and the right of supervision did not alter such relationship. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

The hiring, furnishing, controlling, discharging and paying of assistants although not conclusive of the independent contractor relationship were indicia thereof, to be considered. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

Where the facts were in conflict as to the actual relationship existing, it became the

duty of the trier of the facts to determine the ultimate fact as to whether the relationship was that of employer-employee or principal-independent contractor. *Merrill v. Duffy Reed Constr. Co.*, 82 Idaho 410, 353 P.2d 657 (1960).

Where a trucker contracted in writing with an alleged employer to furnish a truck and driver for hauling logs at a specific rate of pay per quantity of logs hauled, without any stipulation as to the quantity to be hauled, with the alleged employer determining the hauling days and the hours of loading and unloading, and the trucker required to carry public liability insurance, the relationship was that of principal and independent contractor and not employer and employee. *Smith v. Sindt*, 89 Idaho 409, 405 P.2d 959 (1965).

The employer of the operator of a tractor in plowing and seeding pursuant to a contract whereby the employer engaged to plow and seed in crested wheat 2100 acres of federal land for the bureau of land management of the department of the interior was the contractor and not the bureau of land management. *Reedy v. Trummell*, 90 Idaho 318, 410 P.2d 654 (1966).

#### **Joint Enterprise or Joint Venture.**

The evidence was held insufficient to establish a joint enterprise between the injured employee, who was a passenger in a car, and the driver thereof. The court, however, reserved the question of whether or not the doctrine of joint enterprise could have any effect in a compensation case. *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 34 P.2d 417 (1934).

There was no "joint venture" between a fruit dealer and a truck owner, intermittently employed by a grower to drive a truck in delivering fruit to markets, at the time of his injury in a wreck of a truck while hauling peaches for such dealer, but the relationship of "master and servant" existed between them, within the meaning of the Workmen's Compensation Act. *Mulanix v. Falen*, 64 Idaho 293, 130 P.2d 866 (1942).

In denying the claim of a widow and three children in behalf of herself and the minor dependent children for the death of her husband who was accidentally killed while at work on the construction of a domestic sewer for the city of Rexburg, the Supreme Court upheld the industrial accident board which found that an oral contract between deceased and construction company was one of joint venture which could have been fully consummated only by adjustments of details from time to time as the work progressed, further finding deceased not an employee but a joint venturer. *Bowden v. Robert V. Burggraf Constr. Co.*, 85 Idaho 44, 375 P.2d 532 (1962).

The relationship of a joint venture was

analogous to but not identical with a partnership and, where two or more individuals engaged in an enterprise for profit as a joint venture, their employees were employees of the individual participants in the joint venture and not of the joint venture as an entity. *Clawson v. General Ins. Co.*, 90 Idaho 424, 412 P.2d 597 (1966).

#### **Minors.**

Employment of minor though in violation of the Child Labor Law was not void, but created the relationship of employer and employee. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

#### **Occupational Disease.**

Total disability of painter resulting from exposure in the course of a little more than a week to poisonous gas given off by carbon disulphide thinner, was held compensable injury and not occupational disease. *Sullivan Mining Co. v. Aschenbach*, 33 F.2d 1 (9th Cir.), cert. denied, 280 U.S. 586, 50 S. Ct. 35, 74 L. Ed. 635 (1929).

A wood tick bite, resulting in Rocky Mountain fever, was an accident, when arising out of and in the course of his employment, and was compensable. *Reinoehl v. Hamacher Pole & Lumber Co.*, 51 Idaho 359, 6 P.2d 860 (1931); *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933); *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935); *In re Puckett's Estate*, 59 Idaho 529, 84 P.2d 566 (1938).

Where the death of an employee resulted from an occupational disease, recovery may have been had only because of the onslaught of such disease, and not by reason of an accidental injury, and carbon-monoxide poisoning was an occupational disease, and therefore, recovery may not have been sustained as for an accidental injury. *Goasland v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

An injury caused by conditions which science and industry had learned to control and eliminate could not be classed as an occupational disease. *Howard v. Texas Owyhee Mining & Dev. Co.*, 62 Idaho 707, 115 P.2d 749 (1941).

#### **Out of and in Course of Employment.**

Words "out of" referred to origin and cause of accident, and words "in course of" to time, place, and circumstances under which it occurred. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927).

Where accident was foreign to work in which claimant was engaged and did not arise out of or in the course of his employment, action will fail, since both these propositions must have been present in order to warrant recovery. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927).

To constitute accident "arising out of and in

the course of employment," within compensation law, there must have been probable, and possible, connection between cause and effect. *Croy v. McFarland-Brown Lumber Co.*, 51 Idaho 32, 1 P.2d 189 (1931); *Brooke v. Nolan*, 59 Idaho 759, 87 P.2d 470 (1939); *Jensen v. Bohemian Breweries, Inc.*, 64 Idaho 679, 135 P.2d 442 (1943).

An injury arose in the course of employment when it took place, within the period of employment, at a place where the employee may reasonably have been, and while he was reasonably fulfilling the duties of his employment or doing something incidental to it. *Murdock v. Humes & Swanstrom*, 51 Idaho 459, 6 P.2d 472 (1931); *Logue v. Independent Sch. Dist. No. 33*, 53 Idaho 44, 21 P.2d 534 (1933); *Vaughn v. Robertson & Thomas*, 54 Idaho 138, 29 P.2d 756 (1934); *State ex rel. Wright v. Brown*, 64 Idaho 25, 127 P.2d 791 (1942).

The fact of employment was not the sole basis for awarding compensation; it required also that the injury should have occurred in the course of the employment, which expression "in the course of employment," as used in the law of master and servant, meant "while injured in the service of the master" and was not synonymous with "during the period covered by actual employment." *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939).

Where one's employment required that he be at a particular place at a particular time and he there met with an accident, such accident arose out of and in the course of his employment. *Stilwell v. Aberdeen-Springfield Canal Co.*, 61 Idaho 357, 102 P.2d 296 (1940).

Where there was a doubt whether or not an accident arose out of and in the course of the employment, it would have been resolved in favor of the workman. *Hansen v. Superior Prod. Co.*, 65 Idaho 457, 146 P.2d 335 (1944).

Claimant in order to recover compensation for injury must have shown an accident arising out of and in the course of employment which resulted in violence to the physical structure of the body. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952); *Davenport v. Big Tom Breeder Farms, Inc.*, 85 Idaho 604, 382 P.2d 762 (1963).

Accident arose out of employment, if it arose out of a risk incidental to the employment. *Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953).

Under the liberal construction rule, compensation should have been allowed if the injury or death could reasonably have been construed to have arisen out of and in the course of employment. *Beebe v. Horton*, 77 Idaho 388, 293 P.2d 661 (1956).

In determining whether or not the risk or hazard causing the accident was one of the risks of the type of work in which the employee was engaged, the nature of the busi-



ness and the duties of the employees must have been considered together with the activities of the employee at the time of the accident. *Beebe v. Horton*, 77 Idaho 388, 293 P.2d 661 (1956).

Compensation was allowable when the injury arose out of the nature of the employment, conditions, obligations or incidents of the employment but was not allowable if the accident was to be regarded as arising out of an "act of living." *Harrison v. Lustra Corp.* of Am., 84 Idaho 320, 372 P.2d 397 (1962).

A claimant must not only prove she was injured, but she must also prove that the injury was caused by an accident arising out of and in the course of her employment. *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963).

An injury was received in the course of the employment when it came while the workman was doing the duty which he was employed to perform; it arose out of the employment when there was apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work was required to be performed and the resulting injury; therefore, if the injury could have been seen to have followed as a natural incident of the work and would have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arose out of the employment, but it excluded an injury which could not have been fairly traced to the employment as a contributing proximate cause and which came from a hazard to which the workman would have been equally exposed apart from the employment. *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963).

#### —Accidents Covered.

Death of employee crushed by tractor which overturned while employee was driving it up mountainside arose "out of and in course of his employment." *In re Stewart*, 49 Idaho 557, 290 P. 209 (1930).

Tick bites of lumber camp swamper, causing Rocky Mountain spotted fever, were held accident arising out of and in course of employment. *Reinoehl v. Hamacher Pole & Lumber Co.*, 51 Idaho 359, 6 P.2d 860 (1931).

Where the employee was engaged by the employer as a common laborer to assist in repairing a diversion dam across a river, a part of the work consisting in carrying rocks from the bank of the river to a barge anchored in a stream, and while thus engaged the employee slipped and started to fall, and to prevent this he dropped the rock and broke his fall by catching hold of the barge, his injury arose out of and in the course of his employment. *Feuling v. Farmers' Co-op. Ditch*

*Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

Where the evidence disclosed that the employee received no pay for making a trip outside of the state, but he made the trip solely in the interest of, under the direction, and as a special service for his employer, for the purpose of attending a school in order that he might receive instruction in the art of salesmanship of the product handled by his employer; the expenses, transportation, and driver of a motor vehicle being furnished by the employer; that he was not working upon a commission, but worked upon a flat rate hourly basis, it was sufficient to warrant an award of compensation. *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 34 P.2d 417 (1934).

Where the evidence showed that a school teacher desired to purchase a motto to be placed on the stage, also programs, graduation cards, and presents for the graduates, and that suitable articles of the kind desired were not carried in stock by the stores in the vicinity, and that her purpose in making a trip was to buy such supplies, and it further appeared it was the common custom of the school board to permit teachers to purchase such supplies, and such teacher, prior to starting on the trip, had secured the school board's permission to purchase such supplies and the board agreed that the school district would repay her the purchase-price thereof, and the school board neither authorized her nor forbade her to make the trip, this was sufficient to show that she was acting within the line, course and scope of her employment and was entitled to compensation for an injury received during the trip. *England v. Fairview School Dist. No. 16*, 58 Idaho 633, 77 P.2d 655 (1938).

Where the circumstances of an employee's employment made it necessary for him to occupy a bunk which his employers furnished him, pursuant to the agreement entered into between them at the time he was employed, injury received in falling therefrom arose out of, and in the course of, his employment, and he was entitled to compensation therefor. *Totton v. Long Lake Lumber Co.*, 61 Idaho 74, 97 P.2d 596 (1939).

A county commissioner, who was killed when his automobile was struck by a train, while on his way from his home to county seat to attend a meeting of a board, was at the time pursuing the "course of his employment" and, therefore, his death was compensable, in view of the statute which defined actual and necessary expenses which a county is required to pay to a commissioner, as traveling and hotel expenses incurred by the commissioner when absent from his residence in the performance of his official duties, thereby indicating a legislative recognition of the fact that the commissioner would have to travel in



the discharge of his official duties. *Stover v. Washington County*, 63 Idaho 145, 118 P.2d 63 (1941).

Where employee, a dishwasher, was shot by an insane person while taking glasses from kitchen to dining room, such injury arose out of and in the course of employment. *Louie v. Bamboo Gardens*, 67 Idaho 469, 185 P.2d 712 (1947).

Employee accidentally shot during target practice during an extended noon hour lunch period sustained an injury arising out of and in the course of his employment. *Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953).

The industrial accident board held that the fatal injury to McDaniel arose out of his employment, McDaniel being employed by a mining company as superintendent of the mining properties, performing many and varied tasks for his employer, including the one in which he was fatally burned by escaping gas from an acetylene gas welding outfit which he was using to cut up an old automobile that had been abandoned on the mining dump which was a common occurrence in mining country. In re McDaniel, 84 Idaho 7, 367 P.2d 302 (1961).

The evidence established that deceased met with an industrial accident which precipitated injury in such magnitude as to cause his death, namely a coronary attack while driving a road roller. *Laird v. State Hwy. Dep't*, 80 Idaho 12, 323 P.2d 1079 (1958).

The evidence was sufficient to support the board's finding that claimant's injury arose in the course of his employment in that the truck broke loose from the tow truck, ran away out of control causing claimant to jump therefrom, sustaining his injury, all of which took place (a) within the period of employment, (b) at a place where the employee may reasonably have been, and (c) while he was reasonably fulfilling the duties of the employment or doing something incidental to it. *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963).

A worker injured by being struck by a car on the employer's parking lot while walking to her car parked thereon at the conclusion of her work day was injured by an accident arising out of and in the course of her employment. *Foust v. Birdseye Div. of Gen. Foods Corp.*, 91 Idaho 418, 422 P.2d 616 (1967).

#### —Accidents Not Covered.

An automobile accident, in which a sheriff was fatally injured while driving back with his wife, sister, her husband, and a nephew, from a place in Utah, after visiting his brother thereat, to sister's Nevada home, from which he had taken her and her husband to brother's home, with intention to proceed thereafter with his wife to their home in Idaho by way of a Nevada town to which he had gone

from his home at least partially in furtherance of his official business, did not "arise out of and in the course of his employment" by county within the meaning of the Workmen's Compensation Law, in the absence of evidence that such side trip was made in furtherance of such business, or that the service of the county was a concurrent cause of such trip. *Parker v. Twin Falls County*, 62 Idaho 291, 111 P.2d 865 (1941).

As a general rule, an accident suffered by an employee while on his way to work, and before he had reached the premises of the employer, was not compensable, since accident did not arise out of and in the course of employment. In re Croxen, 69 Idaho 391, 207 P.2d 537 (1949).

In an action by the dependent of an employee to recover compensation for the death of the employee as the result of being shot by the employer, where the issue to be determined was whether the shooting was due to personal reasons, evidence by an attendant that the employer had told him either a few minutes before the shooting, or a few minutes after the shooting, that "the kid was breaking up his home life" was properly admissible, since it showed that the death arose outside the employment, and not out of the employment. *Devlin v. Ennis*, 77 Idaho 342, 292 P.2d 469 (1956).

The findings of the industrial accident board and its order denying compensation in a proceeding for death benefits where sawyer, having a preexisting heart condition, had died from a heart attack while working as not arising out of and in the course of his employment being supported by substantial, competent though somewhat conflicting evidence, will not be disturbed. In re Brown, 84 Idaho 432, 373 P.2d 332 (1962).

#### —Exposure to Natural Elements.

Where the evidence showed that the claimant's duty as a police officer on a beat was the patrolling of certain streets and alleys, during all of which time he was exposed to the elements, the temperature at all times being below freezing, that it was his duty and he was required in the performance thereof to patrol this beat, and that during the last hour there was no alternative left to him but to spend his entire time outside, there was sufficient evidence to sustain a finding that his exposure was substantially increased by reason of the nature of the services he was required to perform, and that he was exposed to special and peculiar danger from the elements, greater than that of ordinary persons in the community. This constituted an accident arising out of and in the course of his employment. *Riley v. Boise City*, 54 Idaho 335, 31 P.2d 968 (1934).

If an employee by reason of his duties was

exposed to a special or peculiar danger from the elements — that is, one greater than other persons in the community — and an unexpected injury was sustained by reason of the elements, the injury constituted the accident arising out of and in the course of the employment within the meaning of the statute and freezing came within this rule. *Riley v. Boise City*, 54 Idaho 335, 31 P.2d 968 (1934).

Where the evidence disclosed that window of a cab of a drag-line was opened to permit oiler to oil levers in the cab, that a strong wind broke the light out of the window, that thereafter the cab and operator faced into a cold strong wind, that the operator developed a headache therefrom but continued to work, and subsequently suffered from double vision, this evidence sustained an award of compensation on the ground that the operator's injury resulted from his exposure to the severe wind blowing in through the broken glass. *Stilwell v. Aberdeen-Springfield Canal Co.*, 61 Idaho 357, 102 P.2d 296 (1940).

Exposure in employment to cold weather was not an accident. *Stevens v. Driggs*, 65 Idaho 733, 152 P.2d 891 (1944).

Pleurisy resulting from exposure in going to and working at a fire and continued exposure thereafter was not a result of a personal injury caused by an accident, and not compensable. *Stevens v. Driggs*, 65 Idaho 733, 152 P.2d 891 (1944).

Pneumonia contracted from breathing onion fumes was not a compensable injury. *Morgan v. Simplot*, 66 Idaho 84, 155 P.2d 917 (1945).

The employee must have shown that the accident arose because of something he was doing in the course of his employment and because he was exposed by his employment to some particular danger. *Anderson v. Woensner*, 66 Idaho 441, 159 P.2d 899 (1944).

Where a city electrician, after being exposed to the winter weather, contracted influenza and died of heart complications, it did not constitute an accident which was compensable. *Walters v. Weiser*, 66 Idaho 615, 164 P.2d 593 (1945).

If the injury could have been said to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arose out of the employment. *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946).

#### —On Employer's Premises.

Injuries sustained by employee upon premises owned or controlled by employer, while going to or from particular place where work was to be done, were generally deemed to have arisen out of and in course of employment. *Burchett v. Anaconda Copper Mining*

*Co.*, 48 Idaho 524, 283 P. 515 (1929); *In re MacKenzie*, 55 Idaho 663, 46 P.2d 73 (1935); *Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953).

Where the evidence showed that an employee was on his way to the place where he must work, that he was on the premises of his employer, as invitee and licensee, traversing the only passageway available, and one furnished by the employer for such purpose, and without the use of the passageway in question he could not have reached his place of work, an unavoidable, logical and legal conclusion was inescapable; that at the time of his injury he was in the employ of his employer; he was doing what his employer wanted him to do, he was clearly making a trip over a passageway contemplated by and included in the terms of his employment, and compensation was properly awarded. The fact that the public was permitted to travel to and from the employer's works over such passageway did not change the situation. *Dutson v. Idaho Power Co.*, 57 Idaho 386, 65 P.2d 720 (1937).

The mere presence of an employee on the employer's premises was insufficient, standing alone, upon which to base liability for compensation; neither may compensation have been awarded for every accident which might have occurred on a private roadway of an employer, while the workman may have been going to and from his work. *Neale v. Weaver*, 60 Idaho 41, 88 P.2d 522 (1939).

Where an employee arrived early for work, but was injured on his way to work on a passageway provided by an employer and upon the employer's premises, such early arrival of 30 minutes would not defeat his right to compensation. *Skenn v. Sunshine Mining Co.*, 60 Idaho 741, 96 P.2d 497 (1939).

Where an employer provided and maintained several passageways to the place of work for its employees, to go and return, and an employee was injured in one of such passageways, his right to compensation could not be made to turn upon which passageway employee had selected when he was injured. *Skeen v. Sunshine Mining Co.*, 60 Idaho 741, 96 P.2d 497 (1939).

Highway worker, who was injured while attempting to stop his parked car from rolling forward, was not entitled to compensation, even though just prior to accident he had been walking toward a grader to start his day's work. *Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951).

Manager of nursing home, who was killed while accompanying employer's auditor during a local one hour plane flight in a private plane, did not die in an accident arising out of and in the course of employment where the evidence indicated that the trip was for personal enjoyment, and not in connection with his occupation as manager of the nursing



home. *Beebe v. Horton*, 77 Idaho 388, 293 P.2d 661 (1956).

The so-called "premises" rule was not followed exclusively as a test for determining whether an employee had suffered a compensable accident, as the rule was merely considered as an aid in determining the question of compensability, and an employee injured while on the premises in going to or from work must have established the presence of a risk or hazard of and inherent in the employment itself. In *re Malmquist*, 78 Idaho 117, 300 P.2d 820 (1956).

Death of an employee en route to plant gate after finishing his shift while riding on the running board of a passing truck was not compensable, since the risk the employee took in riding the truck to the plant gate was not a hazard incidental to his employment, as the ride was merely for the personal convenience of the employee. In *re Malmquist*, 78 Idaho 117, 300 P.2d 820 (1956).

The board correctly found and ruled that salesman's taking a shower bath, at a motel where he was stopping overnight, was a personal act in the course of normal living and that an accidental injury, a fall in the shower, did not arise out of or in the course of his employment in spite of claimant's allegations that he was only freshening up so that he could do more paper work for his employer. *Harrison v. Lustra Corp. of Am.*, 84 Idaho 320, 372 P.2d 397 (1962).

An employee of State Hospital South injured while en route to her car parked on the hospital grounds preparatory to leaving at the close of her work day was injured by an accident arising out of and in the course of her employment. *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

#### —Positional Risk Rule.

This state has adopted the positional risk rule, under which, when a death or injury resulting from an unexpected assault occurs on the employer's premises, and in the course of employment, a rebuttable presumption arises that the injury arose out of the employment and was compensable. *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 457 P.2d 400 (1969).

#### —School Employees.

Teacher's injury in automobile collision, while proceeding to residence of chairman of board of trustees to make customary report, arose out of and in course of employment. *Scrivner v. Franklin School Dist. No. 2*, 50 Idaho 77, 293 P. 666 (1930).

School teacher slipped and fell while on the way to school room, while watching the children's conduct. Such injury was compensable. *Logue v. Independent Sch. Dist. No. 33*, 53 Idaho 44, 21 P.2d 534 (1933).

Where the evidence showed that the presi-

dent of a state normal school had been requested by the state board of education to attend an educational meeting, and while traveling on his way there, he was killed, and that his expenses were paid by the state when traveling to and from such meeting, and that the purpose for which he was attending the meeting was to promote cooperation among the educators and increase the efficiency in the schools, it was sufficient to show that his death arose out of and in the course of his employment. *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 37 P.2d 232 (1934).

Injury to school janitor occurring on public highway while on way to work for second half of a regular split shift did not arise out of and in the course of his employment by reason of the fact that the route by which he had to drive between his home and the school was unusually hazardous. *South v. Bonner County School Dist. No. 82*, 91 Idaho 786, 430 P.2d 677 (1967).

#### —Streets or Highway Risks.

Where the employment required the employee to be on the street, he was subject to a different risk than the ordinary traveler, and if he was injured while engaged in that duty or something incidental to it, the accident arose out of and in the course of his employment. *Zeier v. Boise Transf. Co.*, 43 Idaho 549, 254 P. 209 (1927); *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 37 P.2d 232 (1932); *Hansen v. Superior Prod. Co.*, 65 Idaho 457, 146 P.2d 335 (1944). See also *England v. Fairview School Dist. No. 16*, 58 Idaho 633, 77 P.2d 655 (1938).

Claimant was on duty between twelve and one o'clock; he was sent on an errand and was injured a little before one o'clock while returning towards his place of employment, after having secured lunch at home; held that his injury arose out of and in course of his employment. *Zeier v. Boise Transf. Co.*, 43 Idaho 549, 254 P. 209 (1927).

Employee injured in attempting to get on a truck for a ride while returning from lunch was not entitled to compensation, truck not having been furnished as a means of transportation, and accident having occurred on the premises, but half a mile away from place of employment. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927).

Employee's injury and death as result of collision with passenger train, while driving over crossing on his way to work, did not as a matter of law arise out of and in course of his employment, where crossing, though the most direct and practical route to be taken in traveling to employer's premises, was open to public and not within employer's control. *State ex rel. Gallet v. Clearwater Timber Co.*, 47 Idaho 295, 274 P. 802 (1929).

If the work of the employee created the necessity for travel, he was in the course of



his employment though he was serving at the same time some purpose of his own. If, however, the work had had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped and would have been canceled upon failure of private purpose, though the business errand was undone, the travel was then personal and the risk was personal. *Christie v. Robinson Constr. Co.*, 59 Idaho 58, 81 P.2d 65 (1938).

If the service of the master was concurrent cause of a trip which a servant was taking at the time of accident resulting in his injury or death, he or his dependents were entitled to compensation. *Parker v. Twin Falls County*, 62 Idaho 291, 111 P.2d 865 (1941); *Sater v. Home Lumber & Coal Co.*, 63 Idaho 776, 126 P.2d 810 (1942).

Where an assistant manager of a lumber company, who while making a motor trip with his wife, turned off the main highway for the purpose of seeing a prospective customer about the construction of a house, and was fatally injured when a rear tire blew out, the accident "arose out of and in course of employment" so as to render his death compensable. *Sater v. Home Lumber & Coal Co.*, 63 Idaho 776, 126 P.2d 810 (1942).

Where an extra bus driver was subject to call at any time, and when struck by an automobile was on his way home to eat, traveling where the master reasonably expected him to travel with the master's consent and on the master's time under pay per hour, and the master had provided no means of supplying lunch to his employees on his premises, and employee's next schedule was a night run, and he had not changed clothes nor made a daily report nor turned in a punch and coin change box, nor had his evening meal, and at the time of the accident was on his way from the station to the place where transportation was furnished by the employer, under these circumstances the accident was compensable as arising out of and in the course of the employment. *Hansen v. Superior Prod. Co.*, 65 Idaho 457, 146 P.2d 335 (1944).

Where deceased was employed by defendant to haul logs in truck of deceased at a stipulated rate, with a minimum guarantee, death of the employee while crossing railroad tracks in truck on his way to work, was not compensable, though truck was used in his work. *In re Croxen*, 69 Idaho 391, 207 P.2d 537 (1949).

An injury to an employee occurring on a hazardous national forest development road which the employee was traveling in an automobile caravan led by the employer's foreman en route from a cafe in a town, where the employees assembled and met the foreman, to a camp site in the forest development, where the employees were to engage in planting

trees and be paid according to the number of trees planted, arose out of and in the course of his employment. *Diffendaffer v. Clifton*, 91 Idaho 751, 430 P.2d 497 (1967).

#### —Temporary Interruption.

Even though an employee temporarily departed from his usual employment, if he did so to do some act necessary to be done by someone for his employer, or did whatever a human being might reasonably do while in the performance of his duty at the time when he was injured, he did not then cease to be acting in the course of his employment. *In re MacKenzie*, 54 Idaho 481, 33 P.2d 113 (1934).

If an employee leaves his place of employment and goes to another place in close proximity thereto, merely as an observer and to satisfy his curiosity, then he would not reasonably be fulfilling any of the duties of his employment or doing something incidental to it, and would not be, if injured while on such venture, entitled to compensation. But not every slight deviation from an employee's duty will deprive him, or, in case of his death, his dependents, of the right to compensation. *In re MacKenzie*, 54 Idaho 481, 33 P.2d 113 (1934).

An injury to an employee while he was attempting to start an automobile on the employer's premises at noon, preparatory to going home for his lunch, did not arise out of, and in the course of, employment so as to be compensable. *Neale v. Weaver*, 60 Idaho 41, 88 P.2d 522 (1939).

Employment was not interrupted when for a brief interval the employee performed a personal errand that was not forbidden. *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946).

Fact that employee was injured at moment when he was not performing manual labor for his employer did not necessarily prove that the accident did not arise out of or in the course of the employment. *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946).

#### Partner or Corporate Officer.

Member of partnership, owning and operating gasoline filling station, who was injured while engaged in building oil rack in gasoline storage plant erected by oil company under contract whereby company was to supply partnership with gasoline for that plant was an independent contractor and not an employee, where claimant was representative of partnership in operation of the plant. *Horst v. Southern Idaho Oil Co.*, 49 Idaho 58, 286 P. 369 (1930).

A member of a mining partnership may have been entitled to compensation where he acted in the capacity of an employee and was paid wages. *Albertini v. Hull Lease*, 54 Idaho 30, 28 P.2d 205 (1933).

The mere fact that an employee was vice-president and a stockholder of a corporate employer, was not sufficient to deprive him of the right to compensation. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

### Silicosis.

Where an employee's condition was brought about by the breathing of silica dust rock, which was injurious to his lungs, causing the development of tuberculosis, this was sufficient evidence to sustain a holding that the employee was injured as a result of an accident arising out of and in the course of his employment. *Beaver v. Morrison-Knudsen Co.*, 55 Idaho 275, 41 P.2d 605 (1935).

Death of employee from silicosis was compensable. *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1938); *Nixon v. St. Joseph Lead Co.*, 60 Idaho 64, 87 P.2d 1007 (1938).

Silicosis was not an occupational disease, as an "occupational disease" was one which inhered in the particular employment and could not have been prevented by reasonable means. *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1939).

In a proceeding to recover compensation for an employee's death as alleged result of silicosis contracted while employed as miner, where there was no showing that employer furnished, and the employee used, dry drills prohibited by statute, or that there was a sudden "blowing up" due to lethal, latent or dormant tuberculosis, or otherwise, the industrial accident board was justified in finding that the death was caused by occupational disease, and hence not compensable under the Workmen's Compensation Act. *Foote v. Hecla Mining Co.*, 62 Idaho 79, 108 P.2d 1030 (1940).

Silicosis, contracted by miners while working underground, was not an "occupational disease" under the statute, but was compensable, although the mining company had put wet drilling equipment into general use in the mines, where the mines were not provided with any mechanical ventilation and the company did not install exhaust pipes or filters and did not provide masks for underground workers. *Howard v. Texas Owyhee Mining & Dev. Co.*, 62 Idaho 707, 115 P.2d 749 (1941).

Evidence showing that a rock crusher operator suffered from a sudden and unexpected action of silica dust, causing pulmonary tuberculosis, supported a finding and an award for "accidental" tuberculosis. *Dobbs v. Bureau of Hwy's.*, 63 Idaho 290, 120 P.2d 263 (1941).

Silicosis was not compensable as an accident, where evidence showed disease was not due to a sudden onslaught, but was due to a gradual exposure over a period of years.

*Shumaker v. Hunter Lease & Gold Hunter Mines*, 72 Idaho 173, 238 P.2d 425 (1951).

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Claimant in order to recover compensation for silicosis disability must have proven (1) that he was totally disabled from uncomplicated silicosis, or (2) that he was totally disabled as a result of silicosis complicated by tuberculosis of the lungs, and that silicosis was an essential factor in causing the disability. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952); *Flasche v. Bunker Hill Co.*, 83 Idaho 420, 363 P.2d 1024 (1961); *Stockdale v. Sunshine Mining Co.*, 84 Idaho 506, 373 P.2d 935 (1962).



Where doctors were agreed that there was no manifestation of silicosis in claimant's lungs at any time the tuberculosis was not the result of silicosis. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952).

Since passage of Occupational Disease Law disability as result of silicosis could not be considered an accidental injury. *Peterson v. Sunset Minerals, Inc.*, 75 Idaho 354, 272 P.2d 692 (1954).

Where collapse of lung was due partly to silicosis along with other nonoccupational diseases, the collapse of the lung was not an accidental injury, and there could be no recovery of compensation for an accidental injury but recovery was restricted to amount allowed under Occupational Disease Law. *Peterson v. Sunset Minerals, Inc.*, 75 Idaho 354, 272 P.2d 692 (1954).

#### **Stepchildren.**

Where an employee, after marriage to the mother of children by prior marriage, assumed the responsibility of a father to the children, and they were known and called by the employee's name at his request, they were his "dependents" at the time of his injury and death within the meaning of the compensation act. *Nicholas v. Idaho Power Co.*, 63 Idaho 675, 125 P.2d 321 (1942).

The minor children of a deceased workman's widow, the "stepchildren" of the deceased were dependents and entitled on account of his death to benefits under the Workmen's Comp. Law. *Sanders v. Ray*, 67 Idaho 200, 174 P.2d 836 (1946).

#### **Surety.**

Surety of general employer was liable for injury to latter's employee received while working for third person under contract between general employer and third person. *Modlin v. Twin Falls Canal Co.*, 49 Idaho 199, 286 P. 612 (1930).

Under the Workmen's Compensation Law, the duties and liabilities of a surety were prescribed by statute, and the statutory provision became a part of the contract, whether given by surety company or state insurance fund, and the injured workman or legal representatives were authorized to prosecute a separate or independent claim against a surety. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

#### **Wages.**

Wages included "room, heat, light, water and such accommodations" in addition to a monthly salary. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

### **RESEARCH REFERENCES**

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 1 et seq.

**C.J.S.** — 99 C.J.S., Workers' Compensation, § 1 et seq.

**A.L.R.** — Workmen's compensation: Injury sustained while attending employer-sponsored social affair as arising out of and in the course of employment. 47 A.L.R.3d 566.

Labor activity, injuries incurred during. 61 A.L.R.4th 196.

Workers' Compensation: recovery for home service provided by spouse. 67 A.L.R.4th 765.

Coverage of Employee's Injury or Death from Exposure to the Elements. 20 A.L.R.5th 346.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation. 80 A.L.R.5th 417.

Application of workers' compensation laws to illegal aliens. 121 A.L.R.5th 523.

**72-103. Temporary and professional employers.** — (1) So long as the temporary or professional employer, or work site employer, has worker's compensation insurance covering an injured worker, or is a qualified self-insurer covering an injured worker under this title:

(a) The work site employer shall have all of the protections and immunities granted any other employer by this title and shall not be regarded as a third party under section 72-223, Idaho Code.

(b) The temporary or professional employer shall have all of the protections and immunities granted any other employer by this title and shall not be regarded as a third party under section 72-223, Idaho Code, if it exercised the right of control sufficient to be an employer as defined in section 72-102, Idaho Code, and insures its worker's compensation liability accordingly.



(2) Whenever the parties to a temporary or professional employer arrangement contemplated by subsection (1) of this section comply with that subsection, no penalties under the worker's compensation law for being uninsured shall apply to the temporary or professional employer, or the work site employer, and no violation of any provision of title 41, Idaho Code, shall occur.

(3) Whenever there is a temporary or professional employer arrangement as contemplated by subsection (1) of this section, the parties to such arrangement shall have the option to determine for themselves, in writing, whether the temporary or professional employer or the work site employer will be the party to secure liability as required by section 72-301, Idaho Code, and the party so obligated to secure such liability may do so in any manner permitted by this title. In the event that the parties to such an arrangement do not exercise the option provided in this subsection, the obligation to secure such liability shall be with the temporary or professional employer. [I.C., § 72-103, as added by 1997, ch. 130, § 2, p. 393.]

## CHAPTER 2

### SCOPE — COVERAGE — LIABILITY

#### SECTION.

- 72-201. Declaration of police power.
- 72-202. Interstate commerce.
- 72-203. Employments covered.
- 72-204. Private employment — Coverage.
- 72-205. Public employment generally — Coverage.
- 72-206. Idaho youth conservation project — Coverage.
- 72-207. Public employment — Relief work.
- 72-208. Injuries not covered — Wilful intention — Intoxication.
- 72-209. Exclusiveness of liability of employer.
- 72-210. Employer's failure to insure liability.
- 72-211. Exclusiveness of employee's remedy.
- 72-212. Exemptions from coverage.
- 72-213. Election of exempt coverage.
- 72-214. Revocation of election.
- 72-215. [Repealed.]
- 72-216. Contractors.
- 72-217. Extraterritorial coverage.

#### SECTION.

- 72-218. Award subject to credit for benefits furnished or paid under laws of other jurisdictions.
- 72-219. Injuries in transitory employment in Idaho.
- 72-220. Locale of employment.
- 72-221. Coverage for injuries or occupational diseases outside state presumed.
- 72-222. Reciprocal recognition of extraterritorial coverage with other jurisdictions.
- 72-223. Third party liability.
- 72-224. [Repealed.]
- 72-225. Minor employee.
- 72-226. Insane person's compensation payable to guardian.
- 72-227. Doubtful rights subject to commission's determination.
- 72-228. Presumption favoring certain claims.
- 72-229. Surety estopped to deny coverage.
- 72-230. Public assistance — Coverage.

**72-201. Declaration of police power.** — The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or

compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this law provided. [I.C., § 72-201, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" and "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### ANALYSIS

Attorney's fees.  
Construction.  
Employer.  
Exclusive remedy.  
Legislative intent.  
Liberal construction of compensation laws.  
Penalty rationally related to purpose.  
Purpose.  
Questions properly before industrial commission.  
Remedies and procedure.  
Separate action.

### Attorney's Fees.

The purpose of enacting the Workmen's Compensation laws in Idaho was to provide sure relief for injured workers and their dependents. In providing for the payment of attorney's fees in certain cases, the legislature sought to further this purpose in several ways; first, the legislature sought to encourage claimants to press claims which, but for such provision, would not be worth their time and effort once the costs of hiring of attorney had been deducted from the award; and second, the legislature meant to encourage attorneys to represent clients and take on claims which would otherwise not be in their best financial interests due to their relative financial insignificance. *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

There is no authority for the award of attorney fees against a worker's compensation claimant who unsuccessfully appeals a decision. *Swanson v. Kraft, Inc.*, 116 Idaho 315, 775 P.2d 629 (1989).

### Construction.

The Workmen's Compensation Act is to be construed liberally in favor of claimants. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

The act is to be construed liberally in favor of a claimant since the humane purposes which it seeks to serve leave no room for narrow, technical construction. *Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977).

When interpreting §§ 72-201, 72-209 and 72-211, if an injury is cognizable under the worker's compensation law then any common law remedy is barred, but if the injury is not cognizable under workman's compensation, then the employee is left to a remedy under the common law. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

### Employer.

In determining statutory employer status consideration should be given to such elements as ownership of the premises, proprietorship, virtual proprietorship, management of the business, and source of the payment of workmen's compensation premiums. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

### Exclusive Remedy.

Idaho workmen's compensation laws provide the exclusive remedy of an employee against his employer for injuries arising out of and in the course of employment. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

This section and § 72-211 vest exclusive jurisdiction over claims for injuries arising out of and in the course of employment in the Industrial Commission; accordingly, the district court properly dismissed an employee's claim for damages allegedly induced by and during his employment filed directly with the circuit court. *Henderson v. State*, 110 Idaho 308, 715 P.2d 978, cert. denied, 477 U.S. 907,



106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986).

Where the employee was injured when her foot was partially severed by a lawn mower she was operating because the employer did not use the proper engine or safety devices on the lawn mower, but there was no evidence presented to the trial court that the employer wilfully or without provocation physically attacked the employee, there was no genuine issue of material fact, and the trial court was justified in granting summary judgment against the employee in a civil action against the employer for injuries caused by an intentional tort of the employer during the course of employment, since Workmen's Compensation provided an exclusive remedy under the circumstances. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

In granting summary judgment for the company, whose manager engaged in sexual intercourse with a minor employee, the district court had concluded that the minor suffered an injury, a broken hymen, caused by an accident at work. However, a ruptured hymen was not "an unexpected, undesigned, and unlooked for mishap, or untoward event"; it was something that typically occurred when a virgin engaged in sexual intercourse. Consequently, since there was no accident as defined by § 72-102(17)(b), the minor did not suffer a personal injury, as defined by § 72-102(17)(c), and her tort claims were not preempted by the exclusivity provisions of the Idaho Worker's Compensation Act. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

#### **Legislative Intent.**

Since worker's compensation statutes must be considered in the context of the entire act, the court held that it was clear the legislature intended, in order for the worker's compensation law to achieve its purpose of providing sure and certain relief for injured workers and their families, that all claims, issues and civil actions relating in any manner to the injury of a worker be decided by the industrial commission. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

#### **Liberal Construction of Compensation Laws.**

The statutory basis for the principle of liberal construction of the worker's compensation laws in favor of claimants is this section. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990).

#### **Penalty Rationally Related to Purpose.**

Section 72-210 providing a penalty for employer's failure to secure payment of compensation bears a rational relationship to the legitimate legislative purpose of providing "sure and certain relief" for an injured worker and his family enunciated as policy in this

section; accordingly, it does not violate any state or federal due process provisions. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

#### **Purpose.**

The purpose of the worker's compensation law is to provide sure and certain relief for injured workmen and their families and dependents. *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 870 P.2d 1292 (1994).

The express purpose and intent of the legislature in passing the state worker's compensation law was to provide for the exclusivity of the remedy under the statute for claims arising out of and sustained during the course of employment, to the exclusion of other causes of action. *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999).

#### **Questions Properly Before Industrial Commission.**

The question of which of two sureties is responsible for claimant's injury was a "question arising under this law" as provided in § 72-707, and was properly determined by the Industrial Commission. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

#### **Remedies and Procedure.**

In a wrongful death action, the trial court's denial of defendant's motions to dismiss and for summary judgment, both of which were made upon the ground that the industrial commission had exclusive jurisdiction of the matter, did not remove the question of the applicability of workmen's compensation law from the proceedings, and thus the trial court did not err in carrying that issue forward to trial. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

Although the industrial commission and the district court had concurrent jurisdiction to determine whether they had jurisdiction to consider the claim or hear the case, where a notice of injury was filed with the commission before plaintiffs filed their original complaint with the district court, then the commission had the first right to determine the jurisdictional issue and its determination is res judicata upon that question. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

In a wrongful death action, the determination of whether the decedent had been an employee of defendant, rather than an independent contractor or a casual employee, while engaged in making repairs to broken equipment at the bottom of a drill shaft, was a question of fact for the jury, for the question bore not only upon the issue of the court's jurisdiction but also upon the standard of care that defendant owed to the decedent. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).



### Separate Action.

To recover in a separate action against an employer, a plaintiff must allege the existence of a tort not covered by the workmen's compensation statute. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

Where the only allegation of wrongdoing on the part of the employer was the allegation that supervisor twice directed claimant to continue working after she informed him that she had been injured in a fall, the claim for emotional distress resulting therefrom did not constitute a separate tort of outrage compensable under a common-law action for intentional infliction of emotional distress; any such claim, to the extent that it constituted a neurosis or other psychological condition traceable in part to an industrial accident and injury was compensable only under the workmen's compensation scheme. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

The filing of a worker's compensation claim does not constitute a waiver by the employee of the right to attempt to prove that the injury was caused by the wilful or unprovoked physical aggression of the employer and to maintain a civil action against the employer for injuries that were allegedly caused by an intentional tort of the employer during the course of employment. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

To prove aggression sufficient to maintain

an action against the employer for injury caused by the wilful or unprovoked physical aggression of the employer, there must be evidence of some offensive action or hostile attack; it is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

**Cited in:** *Moyer v. Bonneville County*, 96 Idaho 33, 524 P.2d 161 (1974); *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975); *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977); *Cook v. Cook*, 102 Idaho 651, 637 P.2d 799 (1981); *Barker v. Fischbach & Moore, Inc.*, 105 Idaho 108, 666 P.2d 635 (1983); *Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 672 P.2d 1055 (1983); *Horton v. Garrett Freightlines*, 106 Idaho 895, 684 P.2d 297 (1984); *Salinas v. Vierstra*, 107 Idaho 984, 695 P.2d 369 (1985); *Barker v. Fischbach & Moore, Inc.*, 110 Idaho 871, 719 P.2d 1131 (1986); *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987); *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987); *Lowery v. Board of County Comm'rs*, 117 Idaho 1079, 793 P.2d 1251 (1990); *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005); *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Constitutionality.  
Construction.  
Construed as unit.  
Construed liberally.  
Course of employment.  
Nature and purpose.  
Negligence.  
Remedies and procedure.

### Constitutionality.

Prior law similar to this section did not violate constitutional provisions, art. 5, § 20, giving district courts original jurisdiction in all cases, both at law and in equity. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926); *Arneson v. Robinson*, 59 Idaho 223, 82 P.2d 249 (1938).

A party seeking to enforce a statute or to avail himself of its provisions may not question its constitutionality. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

Right of trial by jury was strictly enforceable only as to rights, remedies and actions triable by jury under the common law, and not necessarily as to new or different rights or

remedies not in existence or in contemplation of the constitution when adopted. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

### Construction.

The workmen's compensation law was to be liberally construed in its application to dependents who, because of its enactment, had been deprived of any claims in tort for negligent death of a decedent as well as injured workmen. In *re Haynes*, 95 Idaho 492, 511 P.2d 309 (1973).

### Construed as Unit.

In construing this statute the cardinal rule is to ascertain intention of legislature as expressed in words of statute, and for this purpose act must be considered as a whole.

Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R., 45 F.2d 885 (D. Idaho 1930); Flynn v. Carson, 42 Idaho 141, 243 P. 818 (1926).

In view of the fact that the Workmen's Compensation Law, as originally enacted, was an entirety, it should be construed as a whole. Arneson v. Robinson, 59 Idaho 223, 82 P.2d 249 (1938).

In construing any section or subsection, which is a part of the Workmen's Compensation Law, the latest expression of the legislature should prevail and every part should be considered. Beard v. Lucky Friday Silver-Lead Mines, 67 Idaho 135, 173 P.2d 76 (1946).

### **Construed Liberally.**

Workmen's Compensation Law was to be liberally construed with a view to effect its object and promote justice. McNeil v. Panhandle Lumber Co., 34 Idaho 773, 203 P. 1068 (1921); Flynn v. Carson, 42 Idaho 141, 243 P. 818 (1926); In re Hillhouse's Estate, 46 Idaho 730, 271 P. 459 (1928); In re Larson, 48 Idaho 136, 279 P. 1087 (1929); Burchett v. Anaconda Copper Mining Co., 48 Idaho 524, 283 P. 515 (1929); Cooper v. Independent Transf. & Storage Co., 52 Idaho 747, 19 P.2d 1057 (1933); Kelley v. Prouty, 54 Idaho 225, 30 P.2d 769 (1934); Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 74 P.2d 171 (1937); Olson v. Union Pac. R.R., 62 Idaho 423, 112 P.2d 1005 (1941); Stroschein v. Shay, 63 Idaho 360, 120 P.2d 267 (1941); Long v. Brown, 64 Idaho 39, 128 P.2d 754 (1942); Bishop v. Morrison-Knudsen Co., 64 Idaho 806, 137 P.2d 963 (1943); Smith v. University of Idaho, 67 Idaho 22, 170 P.2d 404 (1946); McCall v. Potlatch Forests, Inc., 67 Idaho 415, 182 P.2d 156 (1947); Frisk v. Garrett Freightlines, Inc., 76 Idaho 27, 276 P.2d 964 (1954); Collins v. Moyle, 83 Idaho 151, 358 P.2d 1035 (1961).

The Workmen's Compensation Law was liberally construed in favor of the employee. Stover v. Washington County, 63 Idaho 145, 118 P.2d 63 (1941); Anderson v. Woesner, 66 Idaho 441, 159 P.2d 899 (1944).

A Workmen's Compensation Act was construed to require the rehabilitation of injured employees and correct treatment where possible. Flock v. J.C. Palumbo Fruit Co., 63 Idaho 220, 118 P.2d 707 (1941).

The compensation act was given a broad liberal construction and doubtful cases were resolved in favor of compensation because the humane purpose of the act left no room for technical construction. Smith v. University of Idaho, 67 Idaho 22, 170 P.2d 404 (1946).

If the language employed in Workmen's Compensation Act together with the Occupational Disease Law permitted, the Supreme Court would refrain from adopting a construction which led to unjust, inequitable, oppressive or absurd consequences. Frisk v. Garrett

Freightlines, Inc., 76 Idaho 27, 276 P.2d 964 (1954).

### **Course of Employment.**

The accident arose "out of and in the course of employment" where it occurred on the premises of employer while plaintiff was performing his assigned job in furtherance of his employment. Provo v. Bunker Hill Co., 393 F. Supp. 778 (D. Idaho 1975).

### **Nature and Purpose.**

The purpose of the law was to provide sure relief for injured workmen and their dependents. McNeil v. Panhandle Lumber Co., 34 Idaho 773, 203 P. 1068 (1921); In re Larson, 48 Idaho 136, 279 P. 1087 (1929).

Entire law manifested purpose on part of legislature, under its police power, to require every industry to bear burden cast upon working class because of personal injuries occasioned by accidents that were incident of occupation, insofar as same may have been compensated by pecuniary consideration. All of its provisions, including procedure to enforce same, should have been considered in view of this purpose and all contracts of indemnity to injured or their dependents when death ensued, should have been so construed insofar as reasonable construction of agreement permitted. Hauter v. Coeur d'Alene Antimony Mining Co., 39 Idaho 621, 228 P. 259 (1923).

The purpose of the Workmen's Compensation Law was to secure compensation for employees disabled, in whole or in part, from earning the support of themselves and their dependents, payable because of, and during the period of their disability, also to secure compensation for the dependents of employees who have been killed by accident, arising out of and in the course of their employment. There was nothing to be found in the law to indicate a legislative intention to provide for compensation for an employee because of an accident which had not resulted in injury causing disability, nor for payment of compensation covering a period of time when the employee was not disabled. McRae v. School Dist. No. 23, 56 Idaho 384, 55 P.2d 724 (1936).

The statute was a declaration of police power providing for compensation for industrial injuries, caused without fault on the part of the employer, regardless of the fellow-servant rule, assumption of risk, or contributory negligence. Arneson v. Robinson, 59 Idaho 223, 82 P.2d 249 (1938).

The compensation law provided a special remedy unknown to the common law, and the act itself deprived the workman of his common-law rights, and provided indemnities in lieu thereof. Close v. General Constr. Co., 61 Idaho 689, 106 P.2d 1007 (1940); Stample v. Idaho Power Co., 92 Idaho 763, 450 P.2d 610 (1969).



Theoretically, the Workmen's Compensation Law was not intended to provide for payment of damages to injured workmen, but only to compensate for loss of earning power. *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941).

The administration of the Workmen's Compensation Law and benefits accruing thereunder to workmen and employees was a fixed principle of the policy of the state. *Stover v. Washington County*, 63 Idaho 145, 118 P.2d 63 (1941).

Workmen's compensation was not meant or intended as life or health insurance, it was purely accident and occupational disease insurance. *Wade v. Pacific Coast Elevator Co.*, 64 Idaho 176, 129 P.2d 894 (1942).

It was the purpose of the law to make the industry carry the burden of loss caused by injuries to workmen, but the employer, not the industry, was liable. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943); *Frisk v. Garrett Freightlines, Inc.*, 76 Idaho 27, 276 P.2d 964 (1954).

The purpose of the Workmen's Compensation Law was to provide not only for employees a remedy which was both expeditious and independent of proof of fault, but also for employers a liability which was limited and determinative. *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969).

### Negligence.

Contributory negligence did not arise under Workmen's Compensation Law. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927); *In re Stewart*, 49 Idaho 557, 290 P. 209 (1930); *In re Coleman*, 53 Idaho 339, 23 P.2d 115 (1933); *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 34 P.2d 417 (1934); *Dutson v. Idaho Power Co.*, 57 Idaho 386, 65 P.2d 720 (1937); *Dillard v. Jones*, 58 Idaho 273, 72 P.2d 705 (1937); *England v. Fairview School Dist.* No. 16, 58 Idaho 633, 77 P.2d 655 (1938); *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941); *Hancock v. Halliday*, 65 Idaho 645, 150 P.2d 137 (1943).

While compensation did not depend on negligence on the part of the employer, his negligence did not exclude, but compelled compensation. *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1938); *Howard v. Texas Owyhee Mining & Dev. Co.*, 62 Idaho 707, 115 P.2d 749 (1941).

The Workmen's Compensation Act was remedial and special law providing compensation for injured employees without referring to negligence on the part of either employer or employee. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1943); *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

Laborer employed to put in road on ore lease was entitled to compensation for back injury sustained in lifting log even though act

was unwise since injury was sustained in the course of employment. *Shaw v. Sikes*, 74 Idaho 425, 263 P.2d 710 (1953).

While compensation did not depend upon negligence of the employer, his negligence contributing to the injury of an employee would bar his subrogation action against a third party tortfeasor. *Liberty Mut. Ins. Co. v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966).

### Remedies and Procedure.

Where, after injury, employee was further injured by doctor employed by employer's compensation insurance carrier while undergoing examination for carrier's benefit, he had no right of action against the insurance carrier unless such injury did not arise out of and in the course of employment and was not compensable under Idaho Workmen's Compensation Act, or injury was sustained under circumstances as to create liability in one other than his employer. *Schulz v. Standard Accident Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954).

The law was purely statutory and, was an expressed departure from the common law, explicitly doing away with common-law actions previously applicable to such controversies. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923).

The Workmen's Compensation Law withdrew every phase of the controversy for compensation from the operation of the common-law rules. *In re Fisk*, 40 Idaho 304, 232 P. 569 (1925); *Haugse v. Sommers Bros. Mfg. Co.*, 43 Idaho 450, 254 P. 212 (1927); *State Ins. Fund v. Hunt*, 52 Idaho 639, 17 P.2d 354 (1932).

By the enactment of the Workmen's Compensation Act, the legislature intended to give the injured workman a speedy, summary and simple remedy for the recovery of compensation in all cases coming within its provisions, that strict rules of procedure were not required, and that in every case where compensation was not settled by agreement, the board, or a member thereof to whom the matter had been assigned, should have made such inquiries and investigations as should have been deemed proper. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

In abolishing all civil actions and remedies, the legislature made it clear that the procedure before the board was not governed by the Civil Practice Act. *O'Neil v. Madison Lumber & Mill Co.*, 61 Idaho 546, 105 P.2d 194 (1940).

In enacting the Workmen's Compensation Law abolishing every remedy for all injuries received by a workman in the course of his employment, the legislature did not intend to take from the workman his common-law remedy for the negligent act of his employer resulting in serious injury and damage to the workman, and give the workman no other remedy in lieu thereof, and would be deemed



to have assumed that every injury would impair the workman's usefulness to some degree, and that a workman should in some measure be compensated under the new remedy set up by the compensation law. *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941).

Although the industrial accident board was a tribunal of limited scope, it had general and exclusive original jurisdiction in the state field of industrial accidents. *Johnson v. Falen*, 65 Idaho 542, 149 P.2d 228 (1944).

The industrial accident board had exclusive jurisdiction of claim for injuries sustained by a minor aged 15 while working for a lumber company. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

As Park was the loaned servant of the trucking company for the purpose of aiding in the unloading of boilers he was transporting at the time of the accident and injury to plaintiff, accident occurring while Park was driving truck out from under boiler as it was being elevated under direction of plaintiff, plaintiff's exclusive remedy was compensation under the Workmen's Compensation

Law. *Cloughley v. Orange Transp. Co.*, 80 Idaho 226, 327 P.2d 369 (1958).

A state employee injured by a state-owned truck driven by a co-employee was precluded from bringing a damage action against the state and said co-employee for such injuries. *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

The enactment of the workmen's compensation laws did not abolish all common-law causes of action between the actual employer (subcontractor) and the statutory employer (general contractor) of an injured workman. *Industrial Indem. Co. v. Columbia Basin Steel & Iron, Inc.*, 93 Idaho 719, 471 P.2d 574 (1970).

Since workmen's compensation is the exclusive remedy provided an employee against his employer for injuries arising out of and in the course of employment, once the employer-employee relationship is shown to exist any common lawsuit against the employer is barred, even though the employer may be negligent in regard to the duty of safety owed to an employee. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975).

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Worker's Compensation, § 102 et seq.

**A.L.R.** — Right to workers' compensation for emotional distress or like injury suffered

by claimant as result of sudden stimuli involving nonpersonnel action — compensability under particular circumstances. 84 A.L.R.5th 249.

**72-202. Interstate commerce.** — This law shall affect the liability of employers engaged in interstate or foreign commerce or otherwise only so far as the same is permissible under the laws of the United States. [I.C., § 72-202, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### Test of Interstate Commerce.

Test for determining whether any particular employment was a part of interstate commerce was whether employee, at time of injury was engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. *Hulse v. Pacific & I.N. Ry.*, 47 Idaho 561, 277 P. 426 (1929); *Moser v. Union Pac. R.R.*, 65 Idaho 479, 147 P.2d 336 (1944).

Section hand injured in yard, not then in use, under repair, enlargement and reconstruction, was performing no duties in furtherance of interstate or foreign commerce or in any way directly or closely and substantially affecting such commerce and was entitled to recovery under state law. *Moser v. Union Pac. R.R.*, 65 Idaho 479, 147 P.2d 336 (1944).

**72-203. Employments covered.** — This law shall apply to all public employment and to all private employment including farm labor contracting not expressly exempt by the provisions of section 72-212, Idaho Code. [I.C., § 72-203, as added by 1971, ch. 124, § 3, p. 422; am. 1996, ch. 194, § 3, p. 604.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### ANALYSIS

Covered employees.  
Exemptions.  
In general.  
Jurors.

#### Covered Employees.

An employee, who worked both in employer's exempt seed potato operation and in employer's covered potato marketing business, was covered by workmen's compensation for an injury suffered while working in the marketing enterprise. *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P.2d 167 (1975).

#### Exemptions.

In order to realize the humane purposes of the workmen's compensation scheme all exemptions from coverage should be construed narrowly. *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P.2d 167 (1975).

#### In General.

The occupation or pursuit of the employer

considered as a whole is the test determining whether the activity is covered by or exempt from the Workmen's Compensation Laws. *Dwigans v. Olander*, 98 Idaho 744, 572 P.2d 178 (1977).

#### Jurors.

Pursuant to § 72-205(2) jurors come within the compass of the Idaho Worker's Compensation Act. *Yount v. Boundary County*, 118 Idaho 307, 796 P.2d 516 (1990).

**Cited in:** *Moyer v. Bonneville County*, 96 Idaho 33, 524 P.2d 161 (1974); *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003).

### DECISIONS UNDER PRIOR LAW

#### Classes of Covered Employers.

Two classes of employers were covered by the Workmen's Compensation Act; one was the normal common-law type of employer and the other was an employer as defined by the statute. *Beedy v. Washington Water Power Co.*, 238 F.2d 123 (9th Cir. 1956).

Since the statute provided that the act

should apply "to all private employment not expressly excepted by the provisions," the court would not restrict its coverage by construction in cases where such restriction was not fairly required by the terms of the act itself. *Collins v. Moyle*, 83 Idaho 151, 358 P.2d 1035 (1961).

### RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 102 et seq.

**C.J.S.** — 99 C.J.S., Workers' Compensation, § 100 et seq.

**72-204. Private employment — Coverage.** — The following shall constitute employees in private employment and their employers subject to the provisions of this law:

(1) A person performing service in the course of the trade, business, profession or occupation of an employer.

(2) A person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer.

(3) An officer of a corporation.

(4) "Employment," in the case of private employers, includes employment only in that trade, business, profession or occupation which is carried on by the employer and also includes any of the pursuits specified in section 72-212, Idaho Code, when the employer shall have elected to come under the law as provided in section 72-213, Idaho Code. [I.C., § 72-204, as added by 1971, ch. 124, § 3, p. 422; am. 2006, ch. 231, § 1, p. 688.]

### STATUTORY NOTES

**Cross References.** — Exemption from coverage, § 72-212.

**Amendments.** — The 2006 amendment, by ch. 231, in subsection (1), inserted "business"; and in subsection (4), substituted "that trade, business, profession or occupation" for

"a trade or occupation," and deleted "for the sake of pecuniary gain" following the first occurrence of "employer."

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### ANALYSIS

Employee.

Employer.

Employer-employee relationship.

Pecuniary gain.

Personal errand during business trip.

#### Employee.

Idaho has recognized a well-established common law rule that where one is requested by an employee to assist in doing such employee's work in the furtherance of the business of the master, and such assistant does such work with the knowledge and acquiescence of the employer, such assistant thereby becomes, in effect, an employee. *Wise v. Arnold Transf. & Storage Co.*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985).

Where the plaintiff's work as an assistant to a truck driver, helping in loading and unloading, involved a small portion of time compared to the amount of time consumed in traveling, for which he was not compensated, such work did not constitute "casual employment" within the meaning of § 72-212(2), since the employment of the plaintiff did not arise inadvertently or at uncertain times, and the work was an integral part of the employer's business; thus, the plaintiff was an employee within the meaning of subdivision (2)

of this section, being an assistant to an employee, and thus was precluded from bringing a personal injury action by § 72-211, providing that workmen's compensation is the exclusive remedy. *Wise v. Arnold Transf. & Storage Co.*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985).

#### Employer.

In determining statutory employer status consideration should be given to such elements as ownership of the premises, proprietorship, virtual proprietorship, management of the business, and source of the payment of workmen's compensation premiums. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

Commonly, the statutory employer pays the premiums covering his or her employees, since it is the employer's legal responsibility to insure that employees are covered by workmen's compensation insurance. *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987).



**Employer-Employee Relationship.**

Coverage under workmen's compensation laws is dependent upon the existence of an employer-employee relationship. *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987).

**Pecuniary Gain.**

In an action in which the industrial commission sought injunctive relief and imposition of a civil penalty against a church because the church failed to obtain worker's compensation insurance for its pastor, the district court properly affirmed a magistrate's decision granting summary judgment in favor of the church; the church did not receive remuneration for services or operate "for the sake of pecuniary gain" within the meaning of §§ 72-204(4) and former 72-212(6). *State ex*

*rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003) (See 2006 amendment).

**Personal Errand During Business Trip.**

The inquiry with regard to cases involving an accident where the claimant was on business but also performing a personal errand is whether the departure from the claimant's employment became so personal that it broke the causal connection to such an extent that the resulting accident could no longer be said to "arise out of and in the course of" the claimant's employment. *Morgan v. Columbia Helicopters, Inc.*, 118 Idaho 347, 796 P.2d 1020 (1990).

**Cited in:** *Dewey v. Merrill*, 124 Idaho 201, 858 P.2d 740 (1993).

## DECISIONS UNDER PRIOR LAW

**Pecuniary Profit.**

An employer supplying service and receiving remuneration for it is a covered employer, irrespective of whether or not it made a profit

out of a particular enterprise. *Modlin v. Twin Falls Canal Co.*, 49 Idaho 199, 286 P.2d 612 (1936); *Dillard v. Jones*, 58 Idaho 273, 72 P.2d 705 (1937).

## RESEARCH REFERENCES

**A.L.R.** — Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Right to compensation under particular statutory provisions. 97 A.L.R.5th 1.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Requisites of, and factors affecting, compensability. 106 A.L.R.5th 111.

Right to workers' compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — Compensability under particular circumstances. 107 A.L.R.5th 441.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Compensability under particular circumstances. 108 A.L.R.5th 1.

**72-205. Public employment generally — Coverage.** — The following shall constitute employees in public employment and their employers subject to the provisions of this law:

(1) Every person in the service of the state or of any political subdivision thereof, under any contract of hire, express or implied, and every official or officer thereof, whether elected or appointed, while performing his official duties, except officials of athletic contests involving secondary schools, as defined by section 33-119, Idaho Code.

(2) Every person in the service of a county, city, or any political subdivision thereof, or of any municipal corporation.

(3) Participants in the Idaho youth conservation project under the supervision of the Idaho state forester.

(4) Every person who is a member of a volunteer fire or police department shall be deemed, for the purposes of this law, to be in the employment of the political subdivision or municipality where the department is organized.

(5) Every person who is a regularly enrolled volunteer member or trainee of the department of disaster and civil defense, or of a civil defense corps,

shall be deemed, for the purposes of this law, to be in the employment of the state.

(6) Members of the Idaho national guard while on duty and employees of or persons providing voluntary service to an approved Idaho national guard morale, welfare, and recreational activity. No Idaho compensation benefits shall inure to any such member, employee or volunteer or their beneficiaries for any injury or death compensable under federal law.

(7) A community service worker, as that term is defined in section 72-102, Idaho Code, is considered to be an employee in public employment for purposes of receiving workmen's compensation benefits, which shall be the community service worker's exclusive remedy for all injuries and occupational diseases as provided under chapters 1 through 8, title 72, Idaho Code.

(8) Every person who participates in a youth employment program funded in whole or in part by state or federal money and administered by a state or federal agency or a nonprofit corporation or entity.

[9](8) A work experience student, as that term is defined in section 72-102, Idaho Code, who does not receive wages while participating in the school's work experience program shall be covered by the school district's policy with the state insurance fund. [I.C., § 72-205, as added by 1971, ch. 124, § 3, p. 422; am. 1972, ch. 136, § 1, p. 302; am. 1981, ch. 190, § 1, p. 335; am. 1989, ch. 155, § 13, p. 371; am. 1989, ch. 200, § 1, p. 500; am. 1990, ch. 301, § 1, p. 830; am. 1990, ch. 335, § 2, p. 912.]

### STATUTORY NOTES

**Cross References.** — Definition of workman and definition of outworker, § 72-102.

National guard covered by state insurance fund, § 72-928.

Youth conservation project participants deemed to be civil employees of state for purposes of workmen's compensation, § 56-609.

**Amendments.** — This section was amended by two 1990 acts, ch. 301, § 1, effective April 5, 1990, and ch. 335, § 2, effective July 1, 1990, which appear to be compatible and have been compiled together.

Both 1990 amendments redesignated former subsection (6) as subsection (7), and added a subsection (8). The subsection (8)

added by ch. 301, § 1 has been compiled as subsection (8), and the subsection (8) added by ch. 335, § 2, has been compiled as subsection [9](8).

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 2 of S.L. 1989, ch. 200 declared an emergency. Approved March 29, 1989.

Section 2 of S.L. 1990, ch. 301 declared an emergency. Approved April 5, 1990.

Section 21 of S.L. 1989, ch. 155 provided that the act should take effect January 15, 1989.

### JUDICIAL DECISIONS

#### ANALYSIS

Correctional facility inmates.

Inmates.

Legislative intent.

Independent basis for defining public employees.

Independent contractors.

School districts.

Jurors.



### **Correctional Facility Inmates.**

An inmate who is serving time in a correctional facility is not working under any contract of hire, either express or implied by law, therefore, they are not employees of the state for worker's compensation purposes. *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999) (decided prior to 2004 amendment).

### **Inmates.**

Inmate who was injured while performing maintenance duties of cleaning rain gutters at the correctional facility where she was incarcerated was not considered to be a community service worker as defined in § 72-102(5), and was not entitled to worker's compensation benefits under subsection (7) of this section. *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999) (decided prior to 2004 amendment).

### **Legislative Intent.**

The public service aspect of community service envisioned by the legislature in subsection (5) of § 72-102, is other than the benefit derived by a correctional institution from having inmates engage in productive activities directed toward maintaining the prison facilities. *Crawford v. Department of Cor.*, 133 Idaho 633, 991 P.2d 358 (1999) (decided prior to 2004 amendment).

### **Independent Basis for Defining Public Employees.**

Each subsection within this section is disjunctively stated as an independent basis for

defining public employees in public employment, and hence identifying those subject to the Worker's Compensation Act. *Yount v. Boundary County*, 118 Idaho 307, 796 P.2d 516 (1990).

### **Independent Contractors.**

Independent contractors are not covered under Idaho's worker's compensation law when in the service of the state or any of its political subdivisions. *Daleiden v. Jefferson County Joint Sch. Dist. No. 251*, 139 Idaho 466, 80 P.3d 1067 (2003).

Term "contract of hire" in § 72-205(1), in the context of the worker's compensation law, denotes an employer/employee relationship, and not simply any contractual hiring arrangement. *Daleiden v. Jefferson County Joint Sch. Dist. No. 251*, 139 Idaho 466, 80 P.3d 1067 (2003).

### **School Districts.**

Physical therapist who was providing services to a school district fell under § 72-205(1), and not § 72-205(2); school districts are political subdivisions of the state itself and not of counties, cities, or municipal corporations. *Daleiden v. Jefferson County Joint Sch. Dist. No. 251*, 139 Idaho 466, 80 P.3d 1067 (2003).

### **Jurors.**

Pursuant to subdivision (2) of this section, jurors come within the encompass of the Idaho Worker's Compensation Act. *Yount v. Boundary County*, 118 Idaho 307, 796 P.2d 516 (1990).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

National guard.  
Prisoners.  
School employees.  
United states projects.

### **National Guard.**

Prior statute did not exclude the National Guard. *Griffith v. National Guard*, 70 Idaho 88, 212 P.2d 403 (1949).

### **Prisoners.**

State penitentiary prisoner was not entitled to recover compensation for injuries sustained while working in the license plate factory under a prison work project authorized by state board of correction, he not being an "employee" under the Workmen's Compensation Law. *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955).

### **School Employees.**

A school janitor's wife, who assisted her husband with the school board's knowledge

and assurance that her assistance was necessary, was held an employee, within the Workmen's Compensation Law. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

Where an employee of the Idaho industrial training school received an injury arising out of, and in the course of, his employment, his right to compensation could not be defeated by the contention that he was engaged in an agricultural pursuit since the law provided that the Workmen's Compensation Act should apply to employees of school districts, which was sufficient to authorize the award of compensation. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

Where a president of a state normal school, while traveling on a highway to attend a



meeting of a state educational association, lost his life, though the board of education had not filed an election with the industrial accident board, and the employment was not carried on by the employer for pecuniary gain, his dependents were entitled to compensation, since the excepted employment from the operation of the act only applied to private employment and not to that of the state. *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 37 P.2d 232 (1934). See also *England v. Fairview School Dist. No. 16*, 58 Idaho 633, 77 P.2d 655 (1938).

### United States Projects.

The United States was not an "employer" within the meaning of the Workmen's Compensation Act so as to bar an action under the wrongful death statute where a workman of the general contractors for a flood control project for the United States fell from a scaffold, and exemption of an "employer" from common law or statutory action for negligence did not apply. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956).

## RESEARCH REFERENCES

**C.J.S.** — 99 C.J.S., Workers' Compensation, § 131.

**A.L.R.** — Insured's receipt of or right to workmen's compensation benefits as affecting recovery under accident, hospital, or medical expense policy. 40 A.L.R.3d 1012.

Right to workers' compensation for emotional distress or like injury suffered as result of sudden stimuli involving nonpersonnel action. 83 A.L.R.5th 103.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Right to compensation under particular statutory provisions. 97 A.L.R.5th 1.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Requisites of, and factors affecting, compensability. 106 A.L.R.5th 111.

Right to workers' compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — Compensability under particular circumstances. 107 A.L.R.5th 441.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Compensability under particular circumstances. 108 A.L.R.5th 1.

**72-206. Idaho youth conservation project — Coverage.** — The benefits secured by section 72-205 of this act to members of the Idaho youth conservation project under the supervision of the Idaho state forester, while on duty, shall be in accordance with the provisions of section 56-609, Idaho Code. [I.C., § 72-206, as added by 1971, ch. 124, § 3, p. 422.]

## JUDICIAL DECISIONS

**Cited in:** *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

**72-207. Public employment — Relief work.** — Whenever any public or municipal corporation mentioned in section 72-205 of this act shall accept, sponsor, take charge of or manage any work or project for the purpose of relief or assisting unemployment, wherein any part or all of the funds used on such project are granted by the United States of America or by the state of Idaho, the persons so working upon such project shall be deemed employees of the public or municipal corporation so sponsoring, accepting, taking charge of or managing such work or project. [I.C., § 72-207, as added by 1971, ch. 124, § 3, p. 422.]

**72-208. Injuries not covered — Wilful intention — Intoxication.** — (1) No compensation shall be allowed to an employee for injury prox-

mately caused by the employee's wilful intention to injure himself or to injure another.

(2) If intoxication is a reasonable and substantial cause of an injury, no income benefits shall be paid, except where the intoxicants causing the employee's intoxication were furnished by the employer or where the employer permits the employee to remain at work with knowledge by the employer or his supervising agent that the employee is intoxicated.

(3) "Intoxication" as used in this section means being under the influence of alcohol or of controlled substances, as defined in section 37-2701(d)[37-2701(e)], Idaho Code. Provided, however, that this definition shall not include an employee's use of a controlled substance for which a prescription has been issued authorizing such substance to be dispensed to the employee, or when such substance is dispensed directly by a physician to the employee, and where the employee's use of the controlled substance is in accordance with the instructions for use of the controlled substance. [I.C., § 72-208, as added by 1971, ch. 124, § 3, p. 422; am. 1989, ch. 364, § 1, p. 912; am. 1997, ch. 274, § 2, p. 799.]

### STATUTORY NOTES

**Cross References.** — Presumption in favor of coverage where employee is killed or physically or mentally unable to testify, § 72-228.

**Compiler's Notes.** — The bracketed reference "37-2701(e)" in subdivision (3) was inserted by the compiler.

### JUDICIAL DECISIONS

#### ANALYSIS

Burden of proof.  
Constitutionality.  
Intoxication.

#### **Burden of Proof.**

The burden of disproving wilful intent to injure himself or herself is not upon the claimant, but rather is in the nature of an affirmative defense, which, if raised by the employer, must be proved by a preponderance of the evidence by the employer. *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996).

#### **Constitutionality.**

The worker's compensation law does not deny the equal protection of the laws to an employee who is intentionally injured on the job by the employer as both this section, denying compensation to an employee who wilfully intends to injure herself, and subsection (3) of § 72-209, providing coverage for the injury of an employee caused by the negligent acts of an employer that made it substantially certain that an injury would occur, require an intention to injure the employee. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

#### **Intoxication.**

A blood alcohol level of .117 percent was not sufficiently high to overcome the presumption contained in § 72-228 that employee's death was not occasioned by his intoxication. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

At hearing before the commission on claimant's application for full income benefits as the surviving widow of employee who was killed when his semi-truck overturned, the expert testimony of a toxicologist regarding the effect of employee's .117 percent blood alcohol level on his ability to operate a motor vehicle was not necessarily binding on the commission which could have concluded that all of the evidence of employee's intoxication did not overcome statutory presumption that employee's death was not caused by his intoxication. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

In hearings on claimant's application for full income benefits as surviving widow of employee who was killed when his semi-truck



overtaken, the commission did not err in its conclusion that there was a lack of substantial evidence in the record that employee's death was caused by intoxication, even though test results revealed that decedent had .117 percent blood alcohol level, where truck stop proprietors testified that employee's behavior was normal and that he did not appear to be intoxicated. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

In view of the presumption contained in § 72-228 that an employee's death was not occasioned by his intoxication, a finding by the commission that employee was intoxicated did not lead to an inevitable conclusion that the intoxication caused the fatal accident. *Hatley v. Lewiston Grain Growers, Inc.*,

97 Idaho 719, 552 P.2d 482 (1976).

This section does not eliminate the requirement that the claimant must show that an accident arose "out of and in the course of" the claimant's employment, but rather, this section provides that if a claimant is otherwise eligible for benefits and the injury is the proximate result of the claimant's intoxication, the claimant's benefits shall be reduced by 50 percent; the section does not create any entitlement to compensation if the claimant is not otherwise eligible for that compensation under the rubric of the workers' compensation statutes. *Morgan v. Columbia Helicopters, Inc.*, 118 Idaho 347, 796 P.2d 1020 (1990).

**Cited in:** *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Burden of proof.

Falling asleep.

Intoxication.

Traffic violators.

Wilful intention to injure.

#### **Burden of Proof.**

Where the employer defended upon the ground that the employee was intoxicated at the time of his injury, the burden to prove this contention was upon the employer. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939).

#### **Falling Asleep.**

The evidence was sufficient to sustain the finding and conclusion that his employment required deceased to travel the road in question, and that at the time the automobile in which he was riding went into the river he was on his way in the course of his employment to perform his duties; and that he was not guilty of wilful intention to injure himself when the car went into the river because he had fallen asleep. In re *Coleman*, 53 Idaho 339, 23 P.2d 1115 (1933).

#### **Intoxication.**

Where an employee was injured in an automobile accident, and a police officer testified that he thought that the employee had odor of liquor on him at the time of the accident, but the officer declined to make such statement under oath, and the employer offered a statement made by the officer to the chief of police, in which it was stated that the employee had been drinking, which statement was excluded, this was error but not sufficiently prejudicial to result in a refusal of the award of compensation. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939).

A written statement made by an officer that at the time of the injury of an employee in an automobile accident, which statement was made to the chief of police after the occurrence of such accident, such statement was not sufficient standing alone to prove intoxication of the employee. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939).

Employer was not entitled to exemption from liability, if intoxication was not the sole or principal factor in death as result of coronary occlusion, even though use of alcohol probably contributed to the death. In re *Smith*, 72 Idaho 8, 236 P.2d 87 (1951).

The death of an employee as the result of being shot by his employer while at work, due to personal animosity, as the result of the employer and the employee dating the same woman, was not compensable though there was evidence that employer was an alcohol paranoiac, since the shooting was the result of a premeditated act. *Devlin v. Ennis*, 77 Idaho 342, 292 P.2d 469 (1956).

The industrial accident board's ultimate finding that decedent, at the time of his accidental death, was returning home after a social evening with friends and not from a mission for his employer was substantiated by the evidence where representative of company with whom decedent's employer had a local sales franchise had not expected decedent's visit and any tenuous connection with employment in the earlier part of the evening had long ended, the major portion of such



evening being spent in social activities and the consumption of liquor. In re Linzy, 79 Idaho 514, 322 P.2d 330 (1958).

#### **Traffic Violators.**

Where an employee attempted to avoid an automobile collision by driving on the wrong side of the street, and during the course of such driving, he collided with a tree, this violation of a traffic ordinance prohibiting driving on the wrong side of the street was not sufficient to award a denial of compensation. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939).

#### **Wilful Intention to Injure.**

Where claimant, who worked for defendant company and another company located adjacent thereto, was injured during lunch hour while proceeding hand over hand down elevator shaft in building occupied by other company while hurrying to get his lunch pail so as to return to work with defendant company, he was not guilty of wilful intention to injure himself. *Shoemaker v. Snow Crop Marketers Div.*, 74 Idaho 151, 258 P.2d 760 (1953).

### **RESEARCH REFERENCES**

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 228 et seq.

**C.J.S.** — 99 C.J.S., Workers' Compensation, § 471 et seq.

**A.L.R.** — Suicide as compensable under Workmen's Compensation Act. 15 A.L.R.3d 616.

**72-209. Exclusiveness of liability of employer.** — (1) Subject to the provisions of section 72-223, the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns.

(2) The liability of an employer to another person who may be liable for or who has paid damages on account of an injury or occupational disease or death arising out of and in the course of employment of an employee of the employer and caused by the breach of any duty or obligation owed by the employer to such other person, shall be limited to the amount of compensation for which the employer is liable under this law on account of such injury, disease, or death, unless such other person and the employer agree to share liability in a different manner.

(3) The exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer or surety, provided that such exemptions from liability shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto. [I.C., § 72-209, as added by 1971, ch. 124, § 3, p. 422.]

### **STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

Ceiling on third party claims.  
Co-employee immunity.  
Common law action.  
Constitutionality.

Employer-employee relationship.  
 Exclusive remedy.  
 Indemnification.  
 —Controlling law.  
 Limitation on employer liability.  
 No claim of physical aggression by employer.  
 Scope of employment.  
 Third-party claims.  
 Tort liability.  
 —Separate action.  
 Waiver of tort claim.

### **Ceiling on Third Party Claims.**

Subsection (2) of this section was intended to put a ceiling on third party indemnity claims against the employer, except in those cases where the claim is based on an express contractual indemnity provision. *Pocatello Indus. Park Co. v. Steel W., Inc.*, 101 Idaho 783, 621 P.2d 399 (1980).

### **Co-employee Immunity.**

Since the relevant criteria for deciding "employee" status throughout the Workmen's Compensation Act is the "course of employment" test set forth in subdivision (14)(a) (now (17)(a)) of § 72-102, that same standard is to be used to determine "employee" status for purposes of determining co-employee immunity. *Wilder v. Redd*, 111 Idaho 141, 721 P.2d 1240 (1986).

The employee who, at the time of the accident, was in his vehicle in the company parking lot on his way to lunch when he collided with co-employee, was acting within the course of his employment, and therefore he was entitled to co-employee immunity pursuant to this section. *Wilder v. Redd*, 111 Idaho 141, 721 P.2d 1240 (1986).

Where the district court finding that a coworker was covered by the co-employee immunity doctrine was not contested by the plaintiffs, and where the plaintiffs did not allege any facts to show why the doctrine should not apply in the case at hand, the district court's summary judgment in favor of the co-worker was affirmed. *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999).

### **Common Law Action.**

Where an employee was receiving workmen's compensation benefits for injuries he sustained when zinc in uncovered pots unexpectedly exploded, he was not entitled to maintain a common law action against the employer on the ground that employer's knowledge of numerous similar occurrences and disregard of such hazardous condition amounted to an intentional tort. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975).

### **Constitutionality.**

The worker's compensation law does not deny the equal protection of the laws to an

employee who is intentionally injured on the job by the employer, as both § 72-208, denying compensation to an employee who wilfully intends to injure herself, and subsection (3) of this section, providing coverage for the injury of an employee caused by the negligent acts of an employer that made it substantially certain that an injury would occur, require an intention to injure the employee. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

### **Employer-Employee Relationship.**

Although the industrial commission and the district court had concurrent jurisdiction to determine whether they had jurisdiction to consider the claim or hear the case, where a notice of injury was filed with the commission before plaintiffs filed their original complaint with the district court, then the commission had the first right to determine the jurisdictional issue and its determination is res judicata upon that question. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

In a wrongful death action, the determination of whether the decedent had been an employee of defendant, rather than an independent contractor or a casual employee, while engaged in making repairs to broken equipment at the bottom of a drill shaft, was a question of fact for the jury, for the question bore not only upon the issue of the court's jurisdiction but also upon the standard of care that defendant owed to the decedent. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

The mining companies were the statutory employers of the claimant and were immune from tort liability under this section and § 72-211, where the mining companies owned the interests being mined within the area, they were proprietors of the mining operation, and they contributed toward the provision of workmen's compensation benefits to the claimant and similarly situated employees. *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987).

### **Exclusive Remedy.**

A statutory employer is responsible for providing workmen's compensation coverage and, in return, is legally immune from suit by an employee based on injuries suffered in an



industrial accident. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

Idaho workmen's compensation laws provide the exclusive remedy of an employee against his employer for injuries arising out of and in the course of employment. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

Where the only allegation of wrongdoing on the part of the employer was the allegation that supervisor twice directed claimant to continue working after she informed him that she had been injured in a fall, the claim for emotional distress resulting therefrom did not constitute a separate tort of outrage compensable under a common-law action for intentional infliction of emotional distress; any such claim, to the extent that it constituted a neurosis or other psychological condition traceable in part to an industrial accident and injury was compensable only under the workmen's compensation scheme. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

Where pilot's estate was sued by estates of employee/passengers killed in plane crash and jury determined pilot was employee of corporation leasing plane, thereby making workers' compensation the exclusive remedy of employee/passengers, trial court erred in overturning the jury verdict and granting a new trial. *Burggraf v. Chaffin*, 121 Idaho 171, 823 P.2d 775 (1991).

Employee alleged a willful or unprovoked physical aggression by his employer, and, therefore, his claim fell into a statutory exception to the exclusive remedy rule under § 72-209(3); consequently, the employee was permitted to collect those workers' compensation benefits for which he was eligible and to bring a cause of action against his employer outside the workers' compensation system. *Dominguez v. Evergreen Res., Inc.*, — Idaho —, 121 P.3d 938 (2005).

### **Indemnification.**

In action for wrongful death caused by collapsing crane fatally injuring an employee, even if rental agreement that provided that lessee would indemnify the lessor against any loss or damages on account of personal injury which was not signed by lessee and in fact was returned unsigned to lessor with explanation that contract was contained in lessee's purchase agreement, were controlling, subsection (2) of this section limits the indemnification of lessee to lessor to the amount lessee is responsible for under workers' compensation law. *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 940 F.2d 1253 (9th Cir. 1991).

### **—Controlling Law.**

Where deceased worker's wife made a claim for, and received worker's compensation benefits from husband's employer, an Idaho subcontractor, and then filed an action against

the contractor in state where husband's death occurred, which resulted in a settlement with the contractor, and the contractor filed an indemnity action against the subcontractor pursuant to the employment contract agreement, the state of Idaho had the most significant relationship to the dispute and Idaho law which states the employer's liability may be varied by agreement governed the effect of the indemnification clause in the subcontract agreement and the district court erred in applying the foreign state's law to void the indemnity agreement. *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, 889 P.2d 82 (1995).

### **Limitation on Employer Liability.**

Where industrial park corporation and its liability insurer brought an action against employer for indemnity in connection with judgment awarded to employee for industrial accident, employer was obligated, under subsection (2) of this section, only up to the amount of compensation and other benefits for which it was liable under the Workmen's Compensation Act. *Pocatello Indus. Park Co. v. Steel W., Inc.*, 101 Idaho 783, 621 P.2d 399 (1980).

### **No Claim of Physical Aggression by Employer.**

Where the claimant made no assertions of physical aggression by his employer or its agents, his claim was barred by subsection (3) of this section. *Cope v. State*, 108 Idaho 416, 700 P.2d 38 (1985).

Where the employee was injured when her foot was partially severed by a lawn mower she was operating because the employer did not use the proper engine or safety devices on the lawn mower, but there was no evidence presented to the trial court that the employer wilfully or without provocation physically attacked the employee, there was no genuine issue of material fact, and the trial court was justified in granting summary judgment against the employee in a civil action against the employer for injuries caused by an intentional tort of the employer during the course of employment since Workmen's Compensation provided an exclusive remedy under the circumstances. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

### **Scope of Employment.**

Generally speaking, an accident is deemed not to be in the course of employment if it occurs while the employee is on his way to work and has not yet reached the employer's premises, or while the employee is on his way home and has left the employer's premises. This general rule is predicated upon the fact that the employee usually selects the particular way, means and conveyance for going to and from work, and thus is himself in control



of the risk. However, an exception to the general rule is when the employee is going and returning in some transportation facility furnished by the employer, for the employer, by taking control of the trip to and from work, has extended the risks of employment and therefore has extended the course of employment. *Hansen v. Estate of Harvey*, 119 Idaho 357, 806 P.2d 450 (Ct. App. 1990).

Where employees were riding in employer-provided transportation when the accident occurred, at that time, the employer had extended the risks of employment to include transportation, and the course of employment had been extended commensurately, thus worker's compensation provided the exclusive remedy and a tort suit against the employer and against the fellow employee's estate was barred by this section. *Hansen v. Estate of Harvey*, 119 Idaho 357, 806 P.2d 450 (Ct. App. 1990).

Because the travelling employee doctrine states that when an employee's work requires the employee to travel away from the employer's place of business or the employee's normal place of work, the employee will be held to be within the course and scope of employment continuously during the trip, except when a distinct departure for personal business occurs, claimant was not a travelling employee because his work did not require him to travel away from his employer's place of business or his normal place of work. *Andrews v. Les Bois Masonry, Inc.*, 127 Idaho 65, 896 P.2d 973 (1995).

### Third-Party Claims.

Where third party paid consideration for release of any claim employer may have had, based on the accident, employer's subrogation rights were extinguished and third party became subrogated to employer's right of reimbursement. Thus, in the event employer's negligence was litigated, and employer was found not negligent, third party held employer's right to be reimbursed for the workmen's compensation benefits paid; conversely, in the event employer was found negligent, third party retained its right to receive a credit towards his judgment, in the amount of the workmen's compensation benefits paid. Therefore, in the posture of such case, the determination of the employer's negligence was unnecessary. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983).

A third party who has paid damages for an injury arising out of the employment of the injured person may hold the employer liable if the injury was concurrently caused by the breach of any duty or obligation owed by the employer to such other person, but the employer's liability shall be limited to the amount of compensation for which the employer is liable under workmen's compensa-

tion. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

The insurer of an employer who is jointly negligent with a third party is not allowed the statutory subrogation rights or reimbursement for workmen's compensation benefits paid to the injured employee allowed by § 72-223(3); the third party may defend on the basis that the employer was negligent whether or not the employer is a party to the action. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

Subsection (2) of this section limits the amount of an employer's liability to a third party where there is an implied promise of indemnity. *Essex Crane Rental Corp. v. Weyher/Livsey Constructors, Inc.*, 940 F.2d 1253 (9th Cir. 1991).

### Tort Liability.

The status of a statutory employer does not exempt all such employers from tort liability as third parties under § 72-223, since the exclusive liability of an employer under subsection (1) of this section, and the exclusive remedies of an employee under § 72-211, are both specifically made "subject to the provisions of section 72-223." *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

This state's Workmen's Compensation Law does not shield an employer of an independent contractor from tort liability for an injury incurred by the independent contractor's employee. *Peone v. Regulus Stud Mills, Inc.*, 858 F.2d 550 (9th Cir. 1988).

To prove aggression sufficient to maintain an action against the employer for injury caused by the wilful or unprovoked physical aggression of the employer, there must be evidence of some offensive action or hostile attack; it is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

Although a municipality and its supervisory employees may have been negligent, even grossly negligent, in not recognizing the danger of having plaintiffs remove certain insulation which contained asbestos, there was simply no evidence that any of the supervisors or the higher city officials ever willfully or intentionally wanted to cause injury to the plaintiffs, and because it is not sufficient to prove that an alleged aggressor committed negligent acts that made it substantially certain that injury would occur, plaintiffs did not prove any wilful or unprovoked physical aggression as required in subsection (3) of this section and thus the plaintiffs' state tort claims were preempted by the Workers' Compensation Act. *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176, 795 P.2d 875 (1990).

When interpreting §§ 72-201, 72-209 and 72-211, if an injury is cognizable under the worker's compensation law then any common law remedy is barred, but if the injury is not cognizable under workman's compensation, then the employee is left to a remedy under the common law. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

#### —Separate Action.

To recover in a separate action against an employer, a plaintiff must allege the existence of a tort not covered by the workmen's compensation statute. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

#### Waiver of Tort Claim.

The filing of a worker's compensation claim does not constitute a waiver by the employee

of the right to attempt to prove that the injury was caused by the wilful or unprovoked physical aggression of the employer and to maintain a civil action against the employer for injuries that were allegedly caused by an intentional tort of the employer during the course of employment. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

**Cited in:** *Carroll v. United Steelworkers*, 107 Idaho 717, 692 P.2d 361 (1984); *Barringer v. State*, 111 Idaho 794, 727 P.2d 1222 (1986); *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991); *Vickers v. Hanover Constr. Co.*, 125 Idaho 832, 875 P.2d 929 (1994); *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005); *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Awards on basis of negligence.  
Liability of federal government.  
Ultra vires.

#### Awards on Basis of Negligence.

An award cannot be made under either Workmen's Compensation Law or Occupational Disease Law on the ground of negligence of employer. *Peterson v. Sunset Minerals, Inc.*, 75 Idaho 354, 272 P.2d 692 (1954).

#### Liability of Federal Government.

The United States was not exempt from suit for damages by virtue of the Workmen's Compensation Act, since the act had been continued without change since the enactment of the Federal Tort Claims Act as evi-

denced by the Idaho Code compiled pursuant to S.L. 1947, ch. 224, and duly proclaimed by the governor by authority of S.L. 1949, ch. 167. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956).

#### Ultra Vires.

That employer, when employee sustained injuries, might have been engaged in ultra vires act was immaterial as affecting right to compensation. *Modlin v. Twin Falls Canal Co.*, 49 Idaho 199, 286 P. 612 (1930).

### RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 195 et seq.

**A.L.R.** — Modern status of effect of state workmen's compensation act on right of third-

person tortfeasor to contribution or indemnity from employer of injured or killed workman. 100 A.L.R.3d 350.

**72-210. Employer's failure to insure liability.** — If an employer fails to secure payment of compensation as required by this act, an injured employee, or one contracting an occupational disease, or his dependents or legal representative in case death results from the injury or disease, may claim compensation under this law and shall be awarded, in addition to compensation, an amount equal to ten per cent (10%) of the total amount of his compensation together with costs, if any, and reasonable attorney's fees if he has retained counsel. [I.C., § 72-210, as added by 1971, ch. 124, § 3, p. 422.]



## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" and "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.  
 Attorney fees.  
 —Jurisdiction.  
 Constitutionality.  
 Contingent attorney's fees.  
 Employer.  
 Notice.  
 Payment of premiums.  
 Penalty and attorney fees.  
 Strict liability.  
 Sufficiency of findings.  
 Uninsured contractor.

### Applicability.

The penalty statute does not require the claimant to make a claim under this section in order to receive an award thereunder. Claimant need only make a claim for compensation in order to be eligible for an award under this section. Once that claim is made it is the commission's right and obligation to make the additional award against an employer who has failed to secure payment. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

### Attorney Fees.

This section and §§ 72-803 and 72-804 evince a general legislative scheme whereby attorney fee issues closely related to the substance of the workers' compensation claims are due to be resolved by the industrial commission. *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

By virtue of this section, claimant was entitled to attorney fees in defendant's appeal of a workers' compensation award since defendant failed to secure payment of compensation as required under § 72-301. *Swenson v. Estate of Craner*, 117 Idaho 57, 785 P.2d 621 (1990).

Employee was entitled to attorney fees on employer's appeal of the dismissal of his application for correction and modification of a compensation order, since the employer failed to secure payment of compensation as required under this section. *Armbrister v. Hanny Custom Farming*, 123 Idaho 31, 844 P.2d 13 (1992).

Where the employer failed to secure payment of compensation as required, and no mitigating circumstances were given which would justify the failure to secure worker's compensation coverage were presented by the

employer, the industrial commission properly awarded costs and attorney fees to the employee. *Jones v. Emmett Manor*, 134 Idaho 160, 997 P.2d 621 (2000).

Where the injured claimant's employer did not carry required worker's compensation insurance, § 72-210, the claimant was entitled to an award of costs and attorney fees relating to proceedings before the Idaho industrial commission and on appeal. *Stoica v. Pocol*, 136 Idaho 661, 39 P.3d 601 (2001).

Idaho industrial commission abused its discretion by awarding attorney fees to an employee almost six months after the deadline for submitting a memorandum of costs and supporting affidavit had passed. *Medrano v. Neibaur*, 136 Idaho 767, 40 P.3d 125 (2002).

### —Jurisdiction.

In view of the uniquely broad grant of original and exclusive jurisdiction over workers' compensation matters given to the industrial commission, and the fact that I.C. § 72-803 confers upon the commission the jurisdiction to resolve claims for attorney fees, there exists a legislative intent that jurisdiction over claims by a client against his attorney arising out of their fee agreement in a workers' compensation case is properly with the industrial commission, and not the district court. *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

### Constitutionality.

This section bears a rational relationship to the legitimate legislative purpose of providing "sure and certain relief" for an injured worker and his family enunciated as policy in § 72-201; accordingly, it does not violate any state or federal due process provisions. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).



Since this section provides no suspect, "near" suspect, or invidiously discriminatory classification, and entangles no fundamental or "quasi" fundamental right, it must be tested under the "rational basis" test for violations of the state and federal equal protection clauses; because the legislature imposed a statutory penalty without regard to fault in every case where the employee's recovery is at risk by virtue of the employer's failure to secure payment of compensation, which is a rational way to insure "sure and certain relief" as envisioned by § 72-201, the section does not create a special class of employers who have not provided security for compensation so as to deny equal protection to them. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

The term "employer" is not unconstitutionally vague. The statutory definition in § 72-102(11) (now 72-102(12)) is sufficient to inform an ordinary person whether he falls within the term "employer." *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

#### **Contingent Attorney's Fees.**

Where a claimant retains counsel pursuant to a contingent fee agreement and the industrial commission is required to award attorney's fees by this section, the commission must base its award on what would be a reasonable fee on a contingent basis. *Shea v. Bader*, 102 Idaho 697, 638 P.2d 894 (1981).

#### **Employer.**

In determining statutory employer status consideration should be given to such elements as ownership of the premises, proprietorship, virtual proprietorship, management of the business, and source of the payment of workmen's compensation premiums. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

#### **Notice.**

Where notice for hearing stated that the purpose of the hearing was to "determine the amount of benefits to which claimant is entitled," the industrial commission's use of the term "benefits" in the notice was sufficient to give employer notice pursuant to § 72-713 that the applicability of this section was at issue. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

#### **Payment of Premiums.**

Commonly, the statutory employer pays the premiums covering his or her employees, since it is the employer's legal responsibility to insure that employees are covered by workmen's compensation insurance. *Rhodes v.*

*Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987).

#### **Penalty and Attorney Fees.**

Where the record in a workmen's compensation proceeding indicated that an employer neither had workmen's compensation insurance at the time of claimant's industrial accident nor had deposited sufficient security with the commission, the commission did not err in awarding a penalty and attorney's fee. *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

#### **Strict Liability.**

The industrial commission did not err in concluding that an employer failing to secure payment of compensation as required by the Workers' Compensation Act is strictly liable for the statutory penalty imposed by this section, since this section is unambiguous and requires no showing of bad faith or scienter as a prerequisite to the imposition of the ten percent surcharge, costs or attorney fees. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

Viewing this section, subsection (1) of § 72-311 and § 72-312 in *pari materia*, it is apparent that the legislature intended strict compliance with those provisions requiring the employer to obtain security for payment of compensation to injured employees and that it intended substantial penalties for noncompliance; accordingly, an employer's good faith but futile attempt to procure insurance did not excuse it from liability for the ten percent surcharge, costs or attorney fees imposed by this section. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

#### **Sufficiency of Findings.**

The industrial commission's finding that an employer had failed to file its notice of security as required by § 72-311 was sufficient to justify the imposition of penalties required by this section, without having to resolve the ultimate issue of coverage between the employer and its insurer. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

#### **Uninsured Contractor.**

A statutory employer who carries workers' compensation insurance is not liable to an employee of an uninsured contractor for the additional ten percent of compensation, plus costs and attorney fees imposed on an employer who does not carry workers' compensation insurance. *Vickers v. Weightman*, 123 Idaho 732, 852 P.2d 484 (1993).

**Cited in:** *Riggs v. Estate of Standlee*, 127 Idaho 427, 901 P.2d 1328 (1995); *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003).

## RESEARCH REFERENCES

**A.L.R.** — Homeowners' or personal liability insurance as providing coverage for liability under workmen's compensation laws. 41 A.L.R.3d 1306.

**72-211. Exclusiveness of employee's remedy.** — Subject to the provisions of section 72-223, the rights and remedies herein granted to an employee on account of an injury or occupational disease for which he is entitled to compensation under this law shall exclude all other rights and remedies of the employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or disease. [I.C., § 72-211, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

This section is regarded as limiting the application of the employer's liability act (§ 44-1401 et seq.).

## JUDICIAL DECISIONS

## ANALYSIS

Course of employment.  
Employer-employee relationship.  
Exclusive remedy.  
Jurisdiction.  
Legislative intent.  
Personal injury action precluded.  
Remedies.  
Scope of employment.  
Tort action.  
Tort liability of employer.  
Waiver of tort claim.

**Course of Employment.**

When the employee was employed by two employers and one employer was attempting to use the Workers' Compensation Law as a shield to avoid third-party liability, it was that employer's duty to prove that the employee was working for the employer when the accident occurred and the fact that the employee was subject to the direction and control of either employer at moment's notice was not determinative; what the employer had to prove as claimant was that the employee's injury arose out of and in the course of his employment with the employer. *Basin Land Irrigation Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (1988).

**Employer-Employee Relationship.**

Although the industrial commission and the district court had concurrent jurisdiction to determine whether they had jurisdiction to consider the claim or hear the case, where a notice of injury was filed with the commission before plaintiffs filed their original complaint with the district court, then the commission

had the first right to determine the jurisdictional issue and its determination is res judicata upon that question. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

In a wrongful death action, the determination of whether the decedent had been an employee of defendant, rather than an independent contractor or a casual employee, while engaged in making repairs to broken equipment at the bottom of a drill shaft, was a question of fact for the jury, for the question bore not only upon the issue of the court's jurisdiction but also upon the standard of care that defendant owed to the decedent. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

The mining companies were the statutory employers of the claimant and were immune from tort liability under § 72-209 and this section, where the mining companies owned the interests being mined within the area, they were proprietors of the mining operation, and they contributed toward the provision of workmen's compensation benefits to the



claimant and similarly situated employees. *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987).

### **Exclusive Remedy.**

A person injured in the course of employment has only one claim against the employer, and that claim is under the worker's compensation statute. *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999).

In granting summary judgment for the company, whose manager engaged in sexual intercourse with a minor employee, the district court had concluded that the minor suffered an injury, a broken hymen, caused by an accident at work. However, a ruptured hymen was not "an unexpected, undesigned, and unlooked for mishap, or untoward event"; it was something that typically occurred when a virgin engaged in sexual intercourse. Consequently, since there was no accident, as defined by § 72-102(17)(b), the minor did not suffer a personal injury, as defined by § 72-102(17)(c), and her tort claims were not preempted by the exclusivity provisions of the Idaho Worker's Compensation Act. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

### **Jurisdiction.**

Sections 72-201 and this section vest exclusive jurisdiction over claims for injuries arising out of and in the course of employment in the Industrial Commission; accordingly, the district court properly dismissed an employee's claim for damages allegedly induced by and during his employment filed directly with the circuit court. *Henderson v. State*, 110 Idaho 308, 715 P.2d 978, cert. denied, 477 U.S. 907, 106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986).

An employee's action against the Industrial Commission and the Insurance Fund and several of their respective employees alleging that she was injured in an industrial accident and received an inadequate award for those injuries was properly dismissed as district courts are expressly forbidden to exercise any jurisdiction in any cause seeking to in any way interfere with the actions or jurisdiction of the Industrial Commission. *West v. State*, 112 Idaho 1038, 739 P.2d 337 (1987).

### **Legislative Intent.**

The express purpose and intent of the legislature in passing the state worker's compensation law was to provide for the exclusivity of the remedy under the statute for claims arising out of and sustained during the course of employment, to the exclusion of other causes of action. *Baker v. Sullivan*, 132 Idaho 746, 979 P.2d 619 (1999).

### **Personal Injury Action Precluded.**

Where the plaintiff's work as an assistant to a truck driver, helping in loading and

unloading, involved a small portion of time compared to the amount of time consumed in traveling, for which he was not compensated, such work did not constitute "casual employment" within the meaning of § 72-212(2), since the employment of the plaintiff did not arise inadvertently or at uncertain times, and the work was an integral part of the employer's business; thus, the plaintiff was an employee within the meaning of § 72-204(2), being an assistant to an employee, and thus was precluded from bringing a personal injury action by this section, providing that workmen's compensation is the exclusive remedy. *Wise v. Arnold Transf. & Storage Co.*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985).

Where the employee was injured when her foot was partially severed by a lawn mower she was operating because the employer did not use the proper engine or safety devices on the lawn mower, but there was no evidence presented to the trial court that the employer wilfully or without provocation physically attacked the employee, there was no genuine issue of material fact, and the trial court was justified in granting summary judgment against the employee in a civil action against the employer for injuries caused by an intentional tort of the employer during the course of employment since Workmen's Compensation provided an exclusive remedy under the circumstances. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

### **Remedies.**

A statutory employer is responsible for providing workmen's compensation coverage and, in return, is legally immune from suit by an employee based on injuries suffered in an industrial accident. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

Idaho workmen's compensation laws provide the exclusive remedy of an employee against his employer for injuries arising out of and in the course of employment. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

To recover in a separate action against an employer, a plaintiff must allege the existence of a tort not covered by the workmen's compensation statute. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

Where the only allegation of wrongdoing on the part of the employer was the allegation that supervisor twice directed claimant to continue working after she informed him that she had been injured in a fall, the claim for emotional distress resulting therefrom did not constitute a separate tort of outrage compensable under a common-law action for intentional infliction of emotional distress; any such claim, to the extent that it constituted a neurosis or other psychological condition traceable in part to an industrial accident and injury was compensable only under the



workmen's compensation scheme. *Yeend v. UPS, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982).

### Scope of Employment.

Where the employee was in an automobile accident with the president of one of his employers, and that employer was attempting to use the Workers' Compensation Law as a shield to avoid third-party tort liability, the burden was on the employer to prove by a preponderance of the evidence that the employee was operating in the scope of his employment when the accident occurred; if the employer failed to meet its burden, then the workers' compensation laws would not apply and the employee would be free to pursue a third-party civil action against the employer and its president in district court. *Basin Land Irrigation Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (1988).

Where claimants who were employed by business located primarily in Idaho were injured while on their way to job in state of Washington, in employer's truck that was being driven by employer's son, they were injured in the course of their employment and pursuant to this section, worker's compensation benefits are their exclusive remedy. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991).

### Tort Action.

A person injured in the course of employment has only one claim against the employer, and that claim is under the Worker's Compensation Act, not a tort action, and since claimants were determined to have been injured while in the course of their employment, and since they did not appeal that finding, they are now precluded from bringing a tort action against their employer. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991).

A prior adjudication by the Industrial Commission on the issue of course of employment is *res judicata* in a subsequently filed tort action. *Hansen v. Estate of Harvey*, 119 Idaho 333, 806 P.2d 426 (1991).

### Tort Liability of Employer.

The status of a statutory employer does not exempt all such employers from tort liability as third parties under § 72-223, since the exclusive liability of an employer under § 72-209(1), and the exclusive remedies of an employee under this section, are both specifically made "subject to the provisions of section

72-223." *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

Where the record was devoid of any findings or testimony as to the medical expense incurred due to medical malpractice, the Industrial Commission's order of an offset of the claimant's total award to the workers' compensation surety pursuant to this section for payments made for the claimant's medical expenses due to the medical malpractice was reversed and remanded for further proceedings to determine the surety's subrogation rights, with recovery from the malpractice settlement in excess of the surety's expenditures in connection therewith to remain in the claimant. *Presnell v. Kelly*, 113 Idaho 1, 740 P.2d 43 (1987).

This state's Workmen's Compensation Law does not shield an employer of an independent contractor from tort liability for an injury incurred by the independent contractor's employee. *Peone v. Regulus Stud Mills, Inc.*, 858 F.2d 550 (9th Cir. 1988).

To prove aggression sufficient to maintain an action against the employer for injury caused by the wilful or unprovoked physical aggression of the employer, there must be evidence of some offensive action or hostile attack; it is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

When interpreting §§ 72-201, 72-209 and 72-211, if an injury is cognizable under the worker's compensation law then any common law remedy is barred, but if the injury is not cognizable under workman's compensation, then the employee is left to a remedy under the common law. *Roe v. Albertson's, Inc.*, 141 Idaho 524, 112 P.3d 812 (2005).

### Waiver of Tort Claim.

The filing of a worker's compensation claim does not constitute a waiver by the employee of the right to attempt to prove that the injury was caused by the wilful or unprovoked physical aggression of the employer and to maintain a civil action against the employer for injuries that were allegedly caused by an intentional tort of the employer during the course of employment. *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988).

**Cited in:** *Wilder v. Redd*, 111 Idaho 141, 721 P.2d 1240 (1986); *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Construction.

Injury without the state.

Remedies.

### Construction.

The United States was not an "employer" within the meaning of the Workmen's Compensation Act so as to bar an action under the wrongful death statute where a workman of the general contractors for a flood control project for the United States fell from a scaffold, and exemption of an "employer" from common law or statutory action for negligence did not apply. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956).

This remedy was purely statutory and was an express departure and innovation so far as the common law was concerned, expressly doing away with common-law actions previously applicable to controversies within the scope of the statute. *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

### Injury Without the State.

The fact that an employee's injury occurred without the state, did not ipso facto defeat his right to compensation. *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 34 P.2d 417 (1934).

### Remedies.

Where employee's injury was aggravated by the negligence of the physician selected by his employer's workmen's compensation insurance carrier in performing examination for carrier's benefit, employee could not, under Idaho law, maintain action against such carrier for damages. *Schulz v. Standard Accident Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954).

Negligence action brought by widow and surviving child of deceased employee who was electrocuted while assisting in the installation of an electric transmission line was precluded since deceased met his death while engaged in the reconducting of transmission lines, a necessary and customary part of a business conducted by appellee power company and therefore even though he was an employee of an independent contractor working on electric power company's land he was an employee of the power company within the compensation statute. *Beedy v. Washington Water Power Co.*, 238 F.2d 123 (9th Cir. 1956).

In a diversity action against phosphate producer by employee of subcontractor to recover for personal injuries sustained in the construction of a furnace where there was no showing that the owner of the plant normally did that kind of construction, the assembly of the furnace was the construction business of the subcontractor, and the phosphate producer was not immune from tort liability since he was not the virtual proprietor or operator of such construction business. *Ray v. Monsanto Co.*, 420 F.2d 915 (9th Cir. 1970).

An injured workman may have maintained an action against the physician furnished by the employer, for malpractice in treating injuries received in the course of his employ-

ment. *Hancock v. Halliday*, 65 Idaho 645, 150 P.2d 137 (1943).

The remedy of compensation was exclusive in all cases of injuries sustained by employees except as to right of action for damages against third parties. *White v. Ponozzo*, 77 Idaho 276, 291 P.2d 843 (1955).

Trucker engaged to haul logs for logging contractors, at rate of pay which included use of equipment, and who was injured while returning from town with tools to repair his truck when struck by contractor's truck driven by co-employee, could not sue contractor for damages as sole remedy was for compensation, since injury was sustained while engaged in work incidental to his employment. *White v. Ponozzo*, 77 Idaho 276, 291 P.2d 843 (1955).

As Park was the loaned servant of the trucking company for the purpose of aiding in the unloading of boilers he was transporting at the time of the accident and injury to plaintiff occurring while Park was driving truck out from under boiler as it was being elevated under direction of plaintiff, plaintiff's exclusive remedy was compensation under the Workmen's Compensation Law. *Cloughley v. Orange Transp. Co.*, 80 Idaho 226, 327 P.2d 369 (1958).

A state employee injured by an accident arising out of and in the course of her employment could not sue the state in tort. *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

This statute removed all remedies other than workmen's compensation, in cases where workmen's compensation was applicable, from "such employee, his personal representatives, dependents, or next of kin." *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969).

Since physical injuries resulting from emotional shock were covered by the Workmen's Compensation Law, female employee was precluded from bringing an action against her employer for damages arising from accident when she was left standing naked in front of her fellow employees after her clothing had become entangled in a machine which she was cleaning, if she was seeking recovery for physical injuries and if she sought recovery for pure emotional trauma no common-law right of recovery existed. *Summers v. Western Idaho Potash Processing Co.*, 94 Idaho 1, 479 P.2d 292 (1970).

Employee who suffered injuries in the course of performing his assigned job and received workmen's compensation therefor was not allowed to maintain a common law action against employer on ground that employer's knowledge and disregard of numerous similar accidents amounted to an intentional tort. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975).

Where plaintiff was injured in the course of



his employment and received workmen's compensation, he was prevented by former law providing for exclusiveness of employee's remedy from also recovering by a suit for damages against his employer based on the theory that employee was a third party beneficiary of a labor management agreement which had been violated by employer thereby resulting in the employee's accident. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975).

Once the employer-employee relationship is shown to exist then any common law suit

against the employer by employee for injuries sustained on the job is barred. *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975).

Where wife filed a claim under the workmen's compensation act for loss of consortium due to injuries suffered by her husband such claim was properly denied as the claim arose out of husband's personal injuries which had already been compensated for under the Workmen's Compensation Law. *Coddington v. Lewiston*, 96 Idaho 135, 525 P.2d 330 (1974).

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 50 et seq.

**A.L.R.** — Uninsured and underinsured motorist coverage: validity, construction, and effect of policy provision purporting to reduce coverage by amount paid or payable under workers' compensation law. 31 A.L.R.5th 116.

Postaccident conduct by employer, employer's insurer, or employer's employees in relation to workers' compensation claim as waiving, or estopping employer from asserting, exclusivity otherwise afforded by workers' compensation statute. 120 A.L.R.5th 513.

**72-212. Exemptions from coverage.** — None of the provisions of this law shall apply to the following employments unless coverage thereof is elected as provided in section 72-213, Idaho Code.

- (1) Household domestic service.
- (2) Casual employment.
- (3) Employment of outworkers.
- (4) Employment of members of an employer's family dwelling in his household.
- (5) Employment of members of an employer's family not dwelling in his household if the employer is the owner of a sole proprietorship, provided the family member has filed with the commission a written declaration of his election for exemption from coverage. For the purposes of this subsection, "member of an employer's family" means a natural person or the spouse of a natural person who is related to the employer by blood, adoption or marriage within the first degree of consanguinity or a grandchild or the spouse of a grandchild.
- (6) Employment as the owner of a sole proprietorship; employment of a working member of a partnership or a limited liability company; employment of an officer of a corporation who at all times during the period involved owns not less than ten percent (10%) of all of the issued and outstanding voting stock of the corporation and, if the corporation has directors, is also a director thereof.
- (7) Employment for which a rule of liability for injury, occupational disease, or death is provided by the laws of the United States.
- (8) Employment as a pilot of an aircraft, while actually operating an aircraft for the purpose of applying fertilizers or pesticides to agricultural crops, shall be exempt from the provisions of the worker's compensation law, provided that:
  - (a) The industrial commission has issued to the agent submitting the policy, written approval of a policy of insurance that will provide benefits



in an amount of not less than: twenty-five thousand dollars (\$25,000) accidental death and dismemberment, ten thousand dollars (\$10,000) medical expense payments, and five hundred dollars (\$500) per month disability income for a minimum of forty-eight (48) months; and

(b) Once the policy has been approved by the industrial commission, proof of coverage for the specified pilot has been filed with the commission prior to the pilot actually operating an aircraft.

Provided however, the agent issuing the policy shall obtain approval of the policy of insurance, and proof of coverage for each pilot insured under the policy shall be filed with the commission, each calendar year. The exemption shall be effective on the date the commission receives proof of coverage for the specified pilot, but no earlier than the date written approval of the policy was issued by the commission.

(9) Associate real estate brokers and real estate salesmen. Service performed by an individual for a real estate broker as an associate real estate broker or as a real estate salesman, if all such service performed by such individual for such person is performed for remuneration solely by way of commission.

(10) Volunteer ski patrollers.

(11) Officials of athletic contests involving secondary schools, as defined in section 33-119, Idaho Code. [I.C., § 72-212, as added by 1971, ch. 124, § 3, p. 422; am. 1972, ch. 20, § 1, p. 26; am. 1972, ch. 186, § 1, p. 473; am. 1974, ch. 94, § 1, p. 1193; am. 1976, ch. 285, § 1, p. 985; am. 1979, ch. 132, § 1, p. 426; am. 1981, ch. 190, § 2, p. 335; am. 1982, ch. 176, § 1, p. 464; am. 1982, ch. 244, § 1, p. 631; am. 1994, ch. 293, § 14, p. 916; am. 1996, ch. 194, § 4, p. 604; am. 1997, ch. 230, § 1, p. 671; am. 1999, ch. 214, § 1, p. 571; am. 2000, ch. 164, § 1, p. 414; am. 2006, ch. 231, § 2, p. 688.]

## STATUTORY NOTES

**Cross References.** — Definition of employment, § 72-204.

**Amendments.** — This section was amended by two 1982 acts which appear to be compatible and have been compiled together. The amendment by ch. 176 inserted "if the corporation has directors" in subdivision (6). The amendment by ch. 244 added the second and third sentences of subdivision (8).

The 2006 amendment, by ch. 231, deleted former subsection (6), which read: "Employment which is not carried on by the employer for the sake of pecuniary gain," and redesignated the remaining subsections accordingly.

**Compiler's Notes.** — Section 5 of S.L. 1996, ch. 194 as amended by § 1 of S.L. 1996, ch. 372 read: "Subsections (2) and (3) of § 41-1612, Idaho Code, as added by Section 1 of this act shall be reviewed by the Legislature during the regular legislative session in 2001, for their adequacy in relation to worker's

compensation insurance rates."

The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

Section 72-204 provides that this act shall apply only to businesses carried on for pecuniary gain, unless an election be filed and also provides that this act shall not apply to employees of excluded businesses unless an election has been filed.

**Effective Dates.** — Section 2 of S.L. 1972, ch. 20 declared an emergency. Approved February 19, 1972.

Section 2 of S. L. 1974, ch. 94 provided this act should be in effect on and after July 1, 1974.

Section 3 of S.L. 1981, ch. 190 declared an emergency. Approved March 31, 1981.

Section 6 of S.L. 1996, ch. 194 provided that the act should be in full force and effect on and after January 1, 1997.

## JUDICIAL DECISIONS

## ANALYSIS

Agricultural exemption.  
Agricultural pursuits.  
Burden of proof.  
Casual employment.  
Determination of claimant's status.  
Employee of exempt and nonexempt employer.  
"Employment."  
Horse breeding.  
Pecuniary gain.  
Separate secondary enterprise.  
Working member of a partnership.

**Agricultural Exemption.**

Where an employee was injured when his leg was pinned between a potato piler and a tractor drawn scraper unit as the employee was working in a cellar in which potatoes were stored on employer's farm, employee's cause of action arose not from an injury received in a warehousing operation but from an injury received in an agricultural pursuit. *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975).

The loading of sacked commercial potatoes on a hand cart in preparation for shipping was not within the agricultural exemption to workmen's compensation. *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P.2d 167 (1975).

The owner of a business involving the removal of manure from feedlots and corrals and the spreading of such manure on farmlands was not engaged in the "raising and harvesting" of agricultural products and was, therefore, covered by the workmen's compensation laws. *Dwigans v. Olander*, 98 Idaho 744, 572 P.2d 178 (1977).

Where the evidence indicated that the milk placed by a dairy in its tanks was a finished product awaiting the choice of alternative disposition, the transportation of that milk by truck was not within the "raising or harvesting of any ... commodity" language contained in the exclusion under subsection (8) [now (7)] of this section; accordingly, an injury suffered by the dairy's milk truck driver was not excluded from workmen's compensation benefits by subsection (8) [now (7)] of this section. *Kuhn v. Box Canyon Livestock, Inc.*, 102 Idaho 658, 637 P.2d 1154 (1981).

Where defendant operated a ranch of more than 450 acres on which he ran a cattle feedlot of 20 acres and grew crops such as wheat, barley and hay on the remaining acres to use as feed, not only does the activity he carried on fall directly within the exemption of subsection (8) [now (7)] of this section—the raising, pelting, shearing, feeding, caring for, training and management of livestock—but the raising of crops for feeding of cattle is an

activity normally done by farmers and thought of as an agricultural pursuit; thus worker injured when he was sprayed with a chemical weed killer after hose broke on spraying machine was not entitled to compensation. *Lesperance v. Cooper*, 104 Idaho 792, 663 P.2d 1094 (1983).

In determining whether an employer is engaged in an agricultural pursuit the trier of fact must look at the statutory definition of an agricultural pursuit in conjunction with the following factors: (1) the general nature of the employer's business; (2) the traditional meaning of agriculture as the term is commonly understood; and (3) that each business will be judged on its own unique characteristics. *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984).

The traditional meaning of agriculture and agricultural pursuits may arguably include horse breeding, but, it can hardly include the training and racing of racehorses; horse racing is not typical of an ordinary farmer, or in any way related to an agricultural purpose. *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984).

Employee injured lifting sacked potatoes while working for a company which grew, harvested and stored seed potatoes was properly found to be engaged in an agricultural pursuit and exempted from coverage under workmen's compensation provisions. *Sellmer v. Ruen*, 115 Idaho 700, 769 P.2d 577 (1989).

A business of selling and breeding hunting dogs did not fall within the agricultural pursuit subsection of this section, and therefore, employee of breeder was not precluded from receiving workmen's compensation benefits. *Partello v. Stipa*, 115 Idaho 522, 768 P.2d 785 (1989).

Where the maintenance and repair of vehicles on the farm on which employee worked was a necessary step in the agricultural production process, the injury employee suffered while repairing a farm vehicle was not subject to the agricultural exemption. *Becerril v. Call*, 127 Idaho 365, 900 P.2d 1376 (1995).

Where the general nature of employer's



business was agricultural, his business activities were those ordinarily done by farmers, and the unique characteristics of his business were agricultural, the employer's activities were within this section's agricultural exemption; consequently, worker's employment at the time of his industrial accident and death was exempt from worker's compensation coverage. *Riggs v. Estate of Standlee*, 127 Idaho 427, 901 P.2d 1328 (1995).

The exemption for agricultural spray pilots codified in subsection (9) [now (8)] of this section as it read prior to April of 2000 is triggered so long as the employer obtains the requisite insurance and the Commission grants approval prior to the date of death or injury. *Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 21 P.3d 890 (2001).

### **Agricultural Pursuits.**

In conjunction with the statutory definition of agricultural pursuit in subsection (1) of this section the Supreme Court has set forth a three-pronged analysis to determine whether an employer is engaged in an agricultural pursuit. The three factors are identified as: (1) "The general nature of the employer's business"; (2) "the traditional meaning of agriculture as the term is commonly understood"; and (3) "each business will be judged on its own unique characteristics." *Riggs v. Estate of Standlee*, 127 Idaho 427, 901 P.2d 1328 (1995).

The term "agricultural pursuit," as used in this section, has been interpreted to include every process and step taken and necessary to the completion of a finished farm product. *Riggs v. Estate of Standlee*, 127 Idaho 427, 901 P.2d 1328 (1995).

### **Burden of Proof.**

After a workman establishes an employer-employee relationship, the burden is on the employer to prove that he is within an exception to coverage as set forth in this section. *Backsen v. Blauser*, 95 Idaho 811, 520 P.2d 858 (1974).

### **Casual Employment.**

In a wrongful death action, the determination of whether the decedent had been an employee of defendant, rather than an independent contractor or a casual employee, while engaged in making repairs to broken equipment at the bottom of a drill shaft, was a question of fact for the jury, for the question bore not only upon the issue of the court's jurisdiction but also upon the standard of care that defendant owed to the decedent. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

Casual employment includes only that employment which arises occasionally or incidentally or which comes at uncertain times or at irregular intervals. *Tuma v. Kosterman*,

106 Idaho 728, 682 P.2d 1275 (1984).

Where the plaintiff's work as an assistant to a truck driver, helping in loading and unloading, involved a small portion of time compared to the amount of time consumed in traveling, for which he was not compensated, such work did not constitute "casual employment" within the meaning of subdivision (2) of this section, since the employment of the plaintiff did not arise inadvertently or at uncertain times, and the work was an integral part of the employer's business. *Wise v. Arnold Transf. & Storage Co.*, 109 Idaho 20, 704 P.2d 352 (Ct. App. 1985).

Daily work of a workmen's compensation claimant who fed dogs and cleaned kennels for a dog breeder was held to be an integral part of employer's business and was neither occasional, incidental, irregular, nor at uncertain times and hence did not fall within the "casual employment" exception. *Partello v. Stipa*, 115 Idaho 522, 768 P.2d 785 (1989).

Casual employment is defined as employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary; it is employment that arises only occasionally or incidentally and is not part of the usual trade or business of the employer. *Larson v. Bonneville Pac. Servs. Co.*, 117 Idaho 988, 793 P.2d 220 (1990).

Where the record showed that claimant was employed by company that maintains and operates power plants and was employed for the sole task of replanting trees; that this task was to be accomplished in two to three weeks; that neither employer nor claimant anticipated that claimant would ever be employed again by employer; that the need for reforestation and revegetation occurs, if at all, at uncertain times or at irregular intervals, and its happening cannot be reasonably anticipated as likely to occur or become necessary; and that revegetation was not the regular business of employer, the record demonstrated substantial and competent evidence to support the commission's finding that employee's employment was casual. *Larson v. Bonneville Pac. Servs. Co.*, 117 Idaho 988, 793 P.2d 220 (1990).

### **Determination of Claimant's Status.**

As employer's business consisted of "transporting" finished agricultural products and not "raising or harvesting" agricultural products and as the nature of employer's business is determinative of claimant's status in regard to workmen's compensation coverage, claimant's employment was not an agricultural pursuit and thus he was covered by workmen's compensation laws. *Backsen v. Blauser*, 95 Idaho 811, 520 P.2d 858 (1974).

Idaho industrial commission's determina-



tion of an employer-employee relationship was based upon substantial and competent evidence, where the employer trained the claimant, provided all of the tools for the work the claimant did, decided which tasks the claimant was to complete, and generally controlled the claimant's work. *Stoica v. Pocol*, 136 Idaho 661, 39 P.3d 601 (2001).

#### **Employee of Exempt and Nonexempt Employer.**

An employee, who worked both in employer's exempt seed potato operation and in employer's covered potato marketing business, was covered by workmen's compensation for an injury suffered while working in the marketing enterprise. *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P.2d 167 (1975).

Where an employer is engaged in both a covered occupation and an exempt occupation, a special employee employed to work exclusively in the covered occupation is covered; thus, since a horse farm owner was involved in two business activities, horse breeding and horse racing, and since horse racing is a covered occupation, the injured claimant who was employed to work exclusively in this enterprise, was also covered for purposes of workmen's compensation. *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984).

Where homeowner took an active role in the construction of his house by hiring subcontractors, providing them the necessary materials and coordinating their services, homeowner was an "employer" under the terms of § 72-102(11) (now 72-102(13)); however, homeowner was exempt from worker's compensation liability because he did not employ worker for the sake of pecuniary gain. *Dewey v. Merrill*, 124 Idaho 201, 858 P.2d 740 (1993).

#### **"Employment."**

The term "employment" as found in subsection (9) [now (8)] of this section does not signify the moment upon which the employment contract is entered into, but rather is indicative of the time at which the pilot is actually in the air flying the plane. *Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 21 P.3d 890 (2001).

#### **Horse Breeding.**

Where a horse farm owner testified that approximately 50 percent of the farm revenue stemmed from winning races with his horses and the other 50 percent from the sale of horses, one could not say that the general nature of the owner's business was primarily horse breeding. *Tuma v. Kosterman*, 106

Idaho 728, 682 P.2d 1275 (1984).

#### **Pecuniary Gain.**

Employer who received remuneration for its services, even though it was a non-profit, tax exempt organization under federal law, was not exempt under this section. *Burrow v. Caldwell Treasure Valley Rodeo, Inc.*, 129 Idaho 675, 931 P.2d 1193 (1997).

In an action in which the industrial commission sought injunctive relief and imposition of a civil penalty against a church because the church failed to obtain worker's compensation insurance for its pastor, the district court properly affirmed a magistrate's decision granting summary judgment in favor of the church; the church did not receive remuneration for services or operate "for the sake of pecuniary gain" within the meaning of §§ 72-204(4) and former 72-212(6). *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003) (See 2006 amendment).

#### **Separate Secondary Enterprise.**

When an employer engages in a secondary enterprise which fairly can be said to be a separate occupation, even though it may be related to the principal business, the nature of that second enterprise supplants the principal business as the governing factor in determining the status of an employee engaged in the secondary separate enterprise; accordingly, where claimant was injured while hauling milk for an enterprise whose principal business was stipulated to be the agricultural pursuit of dairy production, the milk hauling constituted a separate enterprise which was not exempted from workman's compensation liability under subsection (8) [now (7)] of this section. *Kuhn v. Box Canyon Livestock, Inc.*, 102 Idaho 658, 637 P.2d 1154 (1981).

Under § 72-212, a working member of a partnership is not covered under Idaho's workers' compensation law. *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003).

#### **Working Member of a Partnership.**

Idaho industrial commission properly determined under §§ 72-212(7) [now (6)] and 72-419(9) that the claimant's side business should not be determined in the computation of the claimant's total temporary disability benefits. *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003).

**Cited in:** *Sutherlin v. Grant*, 99 Idaho 864, 590 P.2d 1010 (1979); *Iverson v. Farming*, 103 Idaho 527, 650 P.2d 669 (1982); *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Agricultural pursuits.  
 Burden of proof.  
 Casual employment.  
 Construed liberally.  
 Domestics.  
 Employer engaged in covered and exempt occupations.  
 Federal flood control project.  
 Members of employer's family.  
 Pecuniary gain.  
 Public employments.

**Agricultural Pursuits.**

Agricultural pursuits was a broader term than agricultural labor and may have properly included every process and step taken and necessary to the completion of a finished farm product. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923).

Operation of commercial threshing machine outfit is an agricultural pursuit. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923); *Hubble v. Perrault*, 78 Idaho 448, 304 P.2d 1092 (1956).

Where employee in agricultural pursuit was injured before employer had elected to have act apply thereto, he was not entitled to protection hereunder. *Kindall v. McBirney*, 52 Idaho 65, 11 P.2d 370 (1932); *Gloubitz v. Smeed Bros.*, 53 Idaho 7, 21 P.2d 78 (1933); *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933); *Dorrell v. Norida Land & Timber Co.*, 53 Idaho 793, 27 P.2d 960 (1933); *Mundell v. Swedlund*, 59 Idaho 29, 80 P.2d 13 (1938).

Agricultural pursuit did not include commercial delivery of horses, because it was not work carried on by the particular employer, a sales stockyard operator, as an agricultural pursuit on open ranges or in enclosed fields. *Gloubitz v. Smeed Bros.*, 53 Idaho 7, 21 P.2d 78 (1933); *Smythe v. Phoenix*, 63 Idaho 585, 123 P.2d 1010 (1942).

In connection with what constitutes an agricultural pursuit within the meaning of the Workmen's Compensation Law, such law was construed liberally. *Dorrell v. Norida Land & Timber Co.*, 53 Idaho 793, 27 P.2d 960 (1933); *Mundell v. Swedlund*, 59 Idaho 29, 80 P.2d 13 (1938).

Where the evidence was clear and undisputed that with the exception of perhaps a couple of hours on the day of the accident the deceased devoted all of his time to and earned his livelihood by (when employed by his employer) performing the duties of a watchman and the work and labor of general utility man, this supports findings and judgment that at the time of the accident, resulting in his death, he was not engaged in agricultural pursuit and his dependents were entitled to

compensation. *Dorrell v. Norida Land & Timber Co.*, 53 Idaho 793, 27 P.2d 960 (1933).

A workman was not a farm laborer and therefore was not engaged in agricultural pursuit simply because at the moment he was doing work on a farm, but rather, the nature of all of the duties he discharged were looked to to determine whether or not he was classified as engaged in an agricultural pursuit. *Mundell v. Swedlund*, 59 Idaho 29, 80 P.2d 13 (1938).

Where the evidence shows there were but two hay cutters in the community, and but a limited quantity of hay ground, and that commercially in the greater part that it had been the employer's custom from year to year to go about from farm to farm grinding hay at a contract price, this was sufficient to require a finding that neither the employer nor the employee were engaged in farming or performance of farm labor as generally understood. They were engaged in a special work, not ordinarily done by farmers, — a business or industrial pursuit in and of itself, entirely separate and apart from farming, and they did not come within the provision of the compensation law pertaining to agricultural pursuit. *Mundell v. Swedlund*, 59 Idaho 29, 80 P.2d 13 (1938).

The delivery of peaches, necessitating a trip of several hundred miles, by a truck driver for his employer, a fruit grower and dealer, who did not raise such peaches but purchased them for resale, was not "agricultural employment" within the exception from coverage of the Workmen's Compensation Act. *Mulanix v. Falen*, 64 Idaho 293, 130 P.2d 866 (1942).

The question of whether deceased employee was engaged in industrial work and covered by the compensation act or whether his work was agricultural and not covered was a question of fact for the industrial board to determine. *Reed v. Russell*, 67 Idaho 84, 172 P.2d 853 (1938).

Claimant who was injured while unloading logs from employer's farm at the mill was not entitled to compensation where employer had not elected to come under the Workmen's Compensation Act, since work performed at



the time of the injury was incidental to farming operation of the employer. *Bartlett v. Darrah*, 76 Idaho 460, 285 P.2d 138 (1955).

Where claimant was hired to perform exclusively agricultural labor in an agricultural pursuit and was engaged in such pursuit at the time of the accident, he being struck by a truck while pitching pea vines into a threshing machine, regardless of the fact that his employer was also engaged in processing business, a covered employment, such employee hired exclusively to work in the exempt occupation was not covered. *Hubble v. Perrault*, 78 Idaho 448, 304 P.2d 1092 (1956).

The term livestock had reference to and included domestic animals ordinarily found upon farms and public ranges and not to wild life raised in captivity; therefore, claimant who worked as a laborer on mink farm was engaged in covered employment. *Collins v. Moyle*, 83 Idaho 151, 358 P.2d 1035 (1961).

While the court may properly have considered federal acts and decisions and the decisions of other states in determining what constituted an "agricultural pursuit" or a definition of "livestock" where its meaning was in doubt, it was not at liberty to amend the compensation act by incorporating therein the exceptions specifically set out in federal acts or the Idaho employment security act. *Collins v. Moyle*, 83 Idaho 151, 358 P.2d 1035 (1961).

Fact that legislature had amended this section since the adoption in the federal law and the Idaho employment security act of a definition of livestock which included wild and furbearing animals without broadening the definition of livestock herein to include such animals must have been construed as a refusal of the legislature to broaden the exemption from workmen's compensation coverage. *Collins v. Moyle*, 83 Idaho 151, 358 P.2d 1035 (1961).

The operator of a tractor in plowing and seeding pursuant to a contract whereby the employer engaged to plow and seed in crested wheat 2100 acres of federal land for the bureau of land management of the department of the interior was engaged in an agricultural pursuit within the meaning of the statute. *Reedy v. Trummell*, 90 Idaho 318, 410 P.2d 654 (1966).

A horse trainer employed by a corporation engaged in the business of raising, breeding, training, boarding, and selling race horses was not employed in an agricultural pursuit within the meaning of the statute. *Manning v. Win Her Stables, Inc.*, 91 Idaho 549, 428 P.2d 55 (1967).

### **Burden of Proof.**

Employer claiming exemption has burden of proof. *Gloubitz v. Smeed Bros.*, 53 Idaho 7,

21 P.2d 78 (1933). But see *Arbogast v. Jerome Co-op. Creamery*, 65 Idaho 556, 149 P.2d 230 (1944).

After the workman established the employer-employee relationship, the employer had the burden of proving his exemption and employer met the burden by presenting proof that employer did not build the house for pecuniary gain or for a business related purpose. *Lynskey v. Lind*, 94 Idaho 788, 498 P.2d 1261 (1972).

### **Casual Employment.**

The word "casual" applied to the employment, and not to the employee, and time had confirmed the wisdom of the conclusion, early arrived at by the English authorities, that no hard-and-fast definition of the term "casual" was advisable, and that each case must be decided quite largely upon its own special facts. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926); *Dillard v. Jones*, 58 Idaho 273, 72 P.2d 705 (1937); *Rabideau v. Cramer*, 59 Idaho 154, 81 P.2d 403 (1938).

Exclusion was of "casual employment" not necessarily "casual employee"; not those persons but those employments which were casual, were necessarily excluded. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926); *Orr v. Boise Cold Storage Co.*, 52 Idaho 151, 12 P.2d 270 (1932); *Dillard v. Jones*, 58 Idaho 273, 72 P.2d 705 (1937); *Rabideau v. Cramer*, 59 Idaho 154, 81 P.2d 403 (1938); *Bigley v. Smith*, 64 Idaho 185, 129 P.2d 658 (1942).

Employment which was merely incidental or occasional, without regularity or for a limited and temporary purpose, was not a regularly recurring employment which was customary and to be anticipated with regularity, with its hazard a part of the overhead of the industry. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926); *Orr v. Boise Cold Storage Co.*, 52 Idaho 151, 12 P.2d 270 (1932); *Rabideau v. Cramer*, 59 Idaho 154, 81 P.2d 403 (1938).

An employee employed at \$.75 an hour to calcimine the walls and ceiling of a place of business was engaged in "casual employment," so that an injury sustained was not compensable in the event the employer had not elected to come within the Workmen's Compensation Act where the employment was without regularity and for a limited and temporary purpose of redecorating a place of business. *Dawson v. Joe Chester Artificial Limb Co.*, 62 Idaho 508, 112 P.2d 494 (1941).

Work being done by claimant in painting part of a public building when injured was "casual employment" within the exclusion of the Workmen's Compensation Act. *Ross v. Reynolds*, 64 Idaho 87, 127 P.2d 775 (1942).

Claimant, injured in repairing the building, was engaged in "casual employment" within the meaning of the statute, though employer



owned several buildings and claimant made all repairs thereon. *Bigley v. Smith*, 64 Idaho 185, 129 P.2d 658 (1942).

Intermittent employment of a truck owner by a fruit grower and seller to drive the truck in delivering fruit to markets was not casual within the exception of "casual employment" from the coverage of the Workmen's Compensation Act. *Mulanix v. Falen*, 64 Idaho 293, 130 P.2d 866 (1942).

Making drying trays which were an essential part of the equipment of a creamery engaged in the manufacturing of casein was as to the creamery only "casual employment," excluded from coverage of Workmen's Compensation Act, in the absence of a showing of a regular or periodical custom of the creamery to employ workmen to make such trays or that the employment of workmen to make trays was essentially a part of the creamery's business. *Arbogast v. Jerome Co-op. Creamery*, 65 Idaho 556, 149 P.2d 230 (1944).

Carpenter, who watched buildings of defendant for repair, and when they needed repair went and fixed them, could not recover compensation when he fell from a ladder while replacing a chimney jack, as such employment was casual. *Schindler v. McFee*, 69 Idaho 436, 207 P.2d 1158 (1949).

Where dairy from time to time hired deceased to dig cesspools in series of three as additional cesspools were required, the digging of cesspools by deceased was not casual. *Fitzen v. Cream Top Dairy*, 73 Idaho 210, 249 P.2d 806 (1952).

Casual employment was employment which arose occasionally or incidentally at irregular intervals for a limited or temporary purpose and whose happening could not have been reasonably anticipated as certain or likely to occur and which was not a usual concomitant of the business, trade or profession of the employer. *Vogl v. Smythe*, 74 Idaho 115, 258 P.2d 355 (1953).

Claimant hired by the hour to drag county road leading to employer's residence and to clean up driftwood on the beach was engaged in casual employment and barred from compensation benefits. *Vogl v. Smythe*, 74 Idaho 115, 258 P.2d 355 (1953).

If employment was casual, the employee was excluded from benefits of the act unless employer prior to accident had elected in writing to come under the act. *Vogl v. Smythe*, 74 Idaho 115, 258 P.2d 355 (1953).

A painter employed to paint the eaves or fascia of a floral building, an operation last performed about four years before, was engaged in casual employment. *Wachtler v. Calnon*, 90 Idaho 468, 413 P.2d 449 (1966).

A horse trainer for an employer engaged in the business of raising, breeding, training, boarding, and selling race horses, whose employment was a necessary and integral part of

his employer's business, was not a casual employee, even though he sometimes worked for others, worked at his own hours, and was paid on the basis of horses trained rather than hours worked. *Manning v. Win Her Stables, Inc.*, 91 Idaho 549, 428 P.2d 55 (1967), overruled on other grounds, *Tuma v. Kosterman*, 106 Idaho 728, 682 P.2d 1275 (1984).

Where employee, an office manager for employer in state of Idaho, was directed to go to Oregon for the purpose of establishing a new office and to perform such incidental duties as necessary, and where he was killed in Oregon while en route, his employment could not be designated as casual employment. *Heck v. Dow, Inc.*, 93 Idaho 377, 461 P.2d 717 (1969).

### **Construed Liberally.**

Court should not have endeavored by construction to extend its provisions to persons not intended to be included, but it shall be so construed as to carry out its purposes, and, so far as is reasonable, to secure its benefits to all those who were intended to receive them. *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921); *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

Where a partnership consisted of father and son the fact that an injured employee happened to be the son and brother respectively of the partners did not exclude him from the benefits of the Workmen's Compensation Act. *Holt v. Spencer Lumber Co.*, 68 Idaho 478, 199 P.2d 268 (1948).

### **Domestics.**

Watchman employed by group of businessmen to watch their floathouses on lake was not an employee in their businesses where floathouses were primarily maintained for social enjoyment of friends and families of owners. *Doyal v. Hoback*, 75 Idaho 431, 272 P.2d 313 (1954).

### **Employer Engaged in Covered and Exempt Occupations.**

Where the employer was engaged in both a covered occupation and an exempt occupation, a special employee employed to work exclusively in the covered occupation was covered, and likewise an employee hired to work exclusively in an exempt occupation was not covered, regardless of which occupation was the principal one of the employer. *Hubble v. Perrault*, 78 Idaho 448, 304 P.2d 1092 (1956).

### **Federal Flood Control Project.**

The construction of a flood control project by the United States was without financial gain to itself and was similar to an enterprise carried on by a church corporation without pecuniary gain, and under such analogy, since the church corporation would have been sub-

ject to a suit for damages for negligence so also was the government liable for its negligence in connection with the flood project under the Federal Tort Claims Act. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956).

#### **Members of Employer's Family.**

Son, living at home with his father, a partner in defendant partnership, could not recover compensation for injuries sustained while driving father's personal truck on a job though partnership handled the payroll, since father, the direct employer, was not liable for compensation as his son was living at home. *Brewster v. McComb*, 78 Idaho 228, 300 P.2d 507 (1956).

Where claimant who lived at home with his father was employed by partnership consisting of his father and two brothers, he was employed by the partnership, not by his father as an individual, hence he did not come within exemption and therefore was entitled to compensation for injuries received in course of his employment. *Carter v. Carter Logging Co.*, 83 Idaho 50, 357 P.2d 660 (1960).

#### **Pecuniary Gain.**

Where employer was engaged in the enterprise for pecuniary gain, it was immaterial whether or not he was making a profit at time employee was injured. *Modlin v. Twin Falls Canal Co.*, 49 Idaho 199, 286 P. 612 (1930).

If a servant was acting for and at the request of his employer in making a trip, the fact that the employer made no profit out of the venture or incidental to it was immaterial. *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 34 P.2d 417 (1934).

A real estate broker could not escape liability to a carpenter engaged in repairing a building, when injured on the second day of employment, on his contentions that it was casual employment, and because he was not engaged in business for pecuniary gain because he lost money on the transaction. *Dillard v. Jones*, 58 Idaho 273, 72 P.2d 705 (1937).

#### **Public Employments.**

Where an employee of the Idaho industrial training school received an injury arising out of, and in the course of, his employment, his right to compensation could not be defeated by the contention that he was engaged in an agricultural pursuit since the law provided that the Workmen's Compensation Act applied to employees of school districts, which was sufficient to authorize the award of compensation. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

Where a president of a state normal school, while traveling on a highway to attend a meeting of a state educational association, lost his life, though the board of education had not filed an election with the industrial accident board, and the employment was not carried on by the employer for pecuniary gain, his dependents were entitled to compensation, since the excepted employments from the operation of the act only applied to private employment and not to that of the state. *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 37 P.2d 232 (1934). See also *England v. Fairview School Dist. No. 16*, 58 Idaho 633, 77 P.2d 655 (1938).

### **RESEARCH REFERENCES**

**A.L.R.** — Right to workers' compensation for injury suffered at worker's home where home is claimed as "work situs." 4 A.L.R.6th 57.

**72-213. Election of exempt coverage.** — An employer engaged in any of the exempt occupations listed in section 72-212 may elect coverage thereof by a declaration in writing of himself and his surety filed with the commission that the provisions of the law shall apply thereto. Unless the effective date of such coverage is otherwise fixed in such declaration, coverage shall be deemed effective as of the date of filing such election, if the employer also files simultaneously or has on file approved security under section 72-301; otherwise, such coverage shall be deemed effective upon the filing of approved security. [I.C., § 72-213, as added by 1971, ch. 124, § 3, p. 422.]

### **STATUTORY NOTES**

**Compiler's Notes.** — The words "the law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.



## JUDICIAL DECISIONS

**Cited in:** *Lopez v. Allen*, 96 Idaho 866, 538 P.2d 1170 (1975); *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d 144 (1976).

## DECISIONS UNDER PRIOR LAW

**Election of Coverage.**

Requirements for election of coverage, were mandatory and prerequisite to jurisdiction of board, which could not be acquired by estoppel, agreement, waiver or conduct. *Kindall v. McBirney*, 52 Idaho 65, 11 P.2d 370 (1932).

Claimant who was injured while unloading logs from employer's farm at the mill was not entitled to compensation where employer had not elected to come under the Workmen's Compensation Act, since work performed at the time of the injury was incidental to farming operation of the employer. *Bartlett v. Darrah*, 76 Idaho 460, 285 P.2d 138 (1955).

The widow and dependents of one killed in the operation of a tractor for an employer who had contracted to plow and seed in crested

wheat 2100 acres of federal land for the bureau of land management of the department of the interior and who had not elected to come under the Workmen's Compensation Act were not entitled to compensation. *Reedy v. Trummell*, 90 Idaho 318, 410 P.2d 654 (1966).

A painter injured while painting the eaves or fascia of a floral building, for which he had been specially employed and which operation was last performed about four years before, was not entitled to compensation, since the employer had not elected coverage of such work under the Workmen's Compensation Act. *Wachtler v. Calnon*, 90 Idaho 468, 413 P.2d 449 (1966).

**72-214. Revocation of election.** — An election of coverage may be revoked by a declaration in writing of the employer and his surety filed with the commission. The effective date of such revocation shall be ten (10) days from the date of its filing, unless such declaration fixes a more remote date.

The cancelation of coverage by a surety shall revoke an election of coverage theretofore made, unless before the effective date of such cancelation the employer files substitute security, supplemented by the new surety's consent to such election. [I.C., § 72-214, as added by 1971, ch. 124, § 3, p. 422.]

**72-215. Inmates of institutions. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 72-215, as added by 1971, ch. 124, § 3, p. 422, was repealed by S.L. 1972, ch. 354, § 1.

**72-216. Contractors.** — (1) Liability of employer to employees of contractors and subcontractors. An employer subject to the provisions of this law shall be liable for compensation to an employee of a contractor or subcontractor under him who has not complied with the provisions of section 72-301 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer.

(2) Liability of contractors and subcontractors. The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party.

(3) Subrogation.

(a) The employer who shall become liable for and pay such compensation may recover the same from the contractor or subcontractor for whom the



employee was working at the time of the accident causing the injury or manifestation of the occupational disease.

(b) The contractor who shall become liable for and pay such compensation may recover the same from the subcontractor for whom the employee was working at the time of the accident causing the injury or manifestation of the occupational disease. [I.C., § 72-216, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### ANALYSIS

Employee.

Employer.

Subcontractors.

Tort liability of employer.

### Employee.

Worker hired by subcontractor to shake roof on part time basis was ruled an employee of general contractor for the purpose of determining liability for worker's compensation benefits; although worker was paid on a production basis, subcontractor had right to control worker's work, the only major item of equipment was, in essence, supplied by subcontractor who rented the equipment from the worker, and the subcontractor and worker had the right to terminate their relationship at will and without liability. *Roman v. Horsley*, 120 Idaho 136, 814 P.2d 36 (1991).

### Employer.

Trial court erred in finding that a farm, as a mere landowner, was a decedent's statutory employer, because nothing in the record indicated that the farm was engaged in the business of hauling wastewater for pecuniary gain, which was the work being done by the decedent. The farm was not a statutory employer under § 72-102(12)(a) or this section, and was not entitled to the immunity provided by § 72-223. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

Worker was the direct employee of the contractor, which in turn contracted with the respondents, and at the time of his injury, the worker was doing the work his employer had contracted to do; thus, the respondents would not have been permitted to escape liability to the worker if the employer had not complied with § 72-301; hence, they were employers as contemplated in § 72-216. *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

### Subcontractors.

The industrial commission erred in holding that the lumber mill was not liable for subcontractor's employee's worker's compensation benefits. Defendant lumber mill was liable to claimant because defendant hired a contractor who hired a subcontractor who had not complied with the worker's compensation provisions. *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 11 P.3d 475 (2000).

### Tort Liability of Employer.

This state's Workmen's Compensation Law does not shield an employer of an independent contractor from tort liability for an injury incurred by the independent contractor's employee. *Peone v. Regulus Stud Mills, Inc.*, 858 F.2d 550 (9th Cir. 1988).

Section 72-102 defines "employer" more broadly than under common law; "employer" not only includes an employee's direct employer, but includes any contractors and subcontractors as well. Should an employee's direct employer fail to carry worker's compensation, these "statutory employers" are also liable for compensation owing to the injured employee. *Smith v. O/P Transp.*, 128 Idaho 697, 918 P.2d 281 (1996).

Trial court correctly determined that a general contractor was immune from third-party tort liability pursuant to § 72-223 of the Idaho Worker's Compensation Act as a general contractor, given the definitions of employer under this section and § 72-102(12)(a), and thus summary judgment under Idaho R. Civ. P. 56(c) was properly granted in the contractor's favor. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Trial court properly granted summary judgment to a factory in a wrongful death action against it by a decedent's survivors because the factory qualified as the decedent's statutory employer, pursuant to § 72-102(12)(a) and this section, due to its contractual relationship with the decedent's employer for wastewater hauling services. The factory was immune from third-party tort liability under § 72-223 of the Idaho Worker's Compensation Act. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

Employer food service supplier was immune to liability for injuries received by an employee of its subcontractor, because the subcontractor had properly provided workers' compensation coverage for its employees. *Gonzalez v. Lamb Weston, Inc.*, — Idaho —, 124 P.3d 996 (2005).

**Cited in:** *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984); *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 992 P.2d 164 (1999).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Construction.

Creditor and debtor.

Employer's liability.

Joint liability.

Notice to employer.

Notice to subcontractor.

### Construction.

It was the evident intent of the legislature to require the original employer, contractor and subcontractor to pay compensation to workmen injured on the job whether they were employed by the original owner, employer, contractor or by a subcontractor. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

The relation established by the statute is purely statutory. The legislature, for the purposes of the compensation act, created the relation of employer and employee between independent groups who never before had been and did not under the common law, bear that relation to each other. It forced liability on parties who were not in privity of contract. *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

### Creditor and Debtor.

Where a creditor secured a conditional sales contract of a saw mill by a chattel mortgage on the equipment and timber, and at no time subsequent to the sale did he hire, pay, direct, or discharge men, nor did he control the debtor's operation, nor became liable for losses, or share in the profits, the relationship of creditor and debtor was established, not contractor, subcontractor, or partner. *McGee v. Koontz*, 70 Idaho 507, 223 P.2d 686 (1950).

Proprietor's liability extended only to injuries sustained while working in proprietor's business under his contract. Construction partnership employing contractor was not liable for contractor's truck driver's fatal injury while on errand for contractor. *Palmer v. J.A. Terteling & Sons*, 52 Idaho 170, 16 P.2d 221 (1932).

The statute making an "employer," who was subject to the provisions of the act, liable for compensation to an employee of a contractor or subcontractor under such employer, did not apply to an owner of premises on which a dwelling was being constructed, who had no right of control over the laborers directly employed by an uninsured contractor, and who was not an employer. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

A lumber company furnishing most of the materials for the construction of a dwelling, advancing some money to an uninsured contractor, but not inducing any one to believe that the company was the employer of the workmen engaged by the contractor, or that the company had any interest in the construction of the dwelling, was not "estopped" to deny that it was the employer of the contractor's workmen so as to impose liability for compensation on the company. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

Where a lumber company supplying most of the material for the construction of a dwelling had no interest in the profits made by an uninsured contractor, though it was active in assisting the contractor in obtaining the contract and drew the plans and specifications and advanced some money for the payment of labor bills, such company was not a "joint adventurer" with the contractor, and the contractor was not an "independent contractor" of the company so as to impose liability on the company for injuries sustained by a workman of the contractor. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

Where oil company exercised discretion and control over employee of lessee of premises owned by former during absence of latter, it was properly held that both the oil company



and lessee were employers of injured employee. *Moser v. Utah Oil Ref. Co.*, 66 Idaho 710, 168 P.2d 591 (1946).

Where one sold a saw mill on a conditional sales contract, secured the money owed by a chattel mortgage, and received part payment from the produce of the machinery sold, and who exercised no control over the business, and had no interest in the enterprise except as a creditor, he was not a proprietor or operator of the business conducted by the purchaser. *McGee v. Koontz*, 70 Idaho 507, 223 P.2d 686 (1950).

Where respondent company at the time of claimant's injury was an employer subject to the provisions of the workmen's compensation act and where its contractor was the employer of claimant, such respondent was claimant's statutory employer, therefore claimant could elect against which one to pursue his remedy, but, having chosen the statutory employer, his remedy was subject to whatever defenses the law afforded his employer. *Findley v. Flanagan*, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

Where the work which was performed was a regular and predictable part of the work generally done by the defendant's own employees, he became the statutory employer of the subcontractor's employees where he had contracted that work to a subcontractor or to an independent contractor. *Adam v. Titan Equip. Supply Corp.*, 93 Idaho 644, 470 P.2d 409 (1970).

### **Employer's Liability.**

An employer was liable for compensation to an employee of a subcontractor working for this employer at the time of the accident. In re *Fisk*, 40 Idaho 304, 232 P. 569 (1925).

The failure of the owner of premises on which a dwelling was being constructed, who was not an "employer" within the meaning of the Workmen's Compensation Act defining that term, or a contractor or subcontractor within said act prescribing the means of securing compensation to employees, to enforce against the contractor and the contractor's surety provision of the contract requiring the contractor to maintain insurance to protect the owner from claims under the act, did not render the owner secondarily liable to a laborer injured in the course of the construction of the building. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

Son, living at home with his father, a partner in defendant partnership, could not recover compensation for injuries sustained while driving father's personal truck on a job though partnership handled the payroll, since father, the direct employer, was not liable for compensation as his son was living at home.

*Brewster v. McComb*, 78 Idaho 228, 300 P.2d 507 (1956).

### **Joint Liability.**

While holding the employer liable, this language gave him such a recourse against the contractor as made the latter in effect primarily responsible. *Modlin v. Twin Falls Canal Co.*, 49 Idaho 199, 286 P. 612 (1930).

The fact that the liability extended to both the original contractor and subcontractor, so far as the employer was concerned, and gave to the employer the right to recover any amount paid by him from the contractor or subcontractors, did not prevent or interfere with the employee making his claim and asserting his rights directly against either or all, and if for any reason the employer desired to have the subcontractor brought in and bound by any order or judgment that may have been entered against the employer, it was his duty to have such subcontractor made a party to the proceedings. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938); *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

Employee of county was entitled to bring third party action against construction company engaged in building new bridge for damages sustained as result of injuries caused by negligent operation of dragline by employee of construction company while removing debris of old bridge torn down by county. *Brown v. Arrington Constr. Co.*, 74 Idaho 338, 262 P.2d 789 (1953).

Owner or proprietor of the premises as the statutory employer was liable for compensation to a workman injured on the job should independent contractor who was workman's immediate employer have failed to comply with provisions of workmen's compensation laws requiring coverage for his employees. In re *Sines*, 82 Idaho 527, 356 P.2d 226 (1960).

Legislature intended to require principal, his independent contractor and any subcontractor under the independent contractor to pay workmen's compensation to any workman injured on the job whether employed by the principal, independent contractor or subcontractor. In re *Sines*, 82 Idaho 527, 356 P.2d 226 (1960).

Although the statute did not provide for the situation wherein the negligence of the statutory employer was the sole, proximate cause of the injuries suffered by the employee, there was nothing to deprive the actual employer from obtaining indemnity or reimbursement from the negligent statutory employer to the extent of the compensation for which the actual employer was liable under this act. *Industrial Indem. Co. v. Columbia Basin Steel & Iron, Inc.*, 93 Idaho 719, 471 P.2d 574 (1970).



**Notice to Employer.**

The defense of the statutory employer that claimant failed to state a claim upon which relief could be granted, particularly claiming employer did not have timely notice in that notice was not given for 85 days of the accident and that the employer was not afforded the opportunity to provide claimant with reasonable medical and kindred services was substantiated by the evidence establishing resultant prejudice to employer. *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962),

overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

**Notice to Subcontractor.**

It was no ground to deny compensation that an injured workman, or his dependents in case of his death, did not serve the notice on a subcontractor where it was served upon the employer himself. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

**72-217. Extraterritorial coverage.** — If an employee, while working outside the territorial limits of this state, suffers an injury or an occupational disease on account of which he, or in the event of death, his dependents, would have been entitled to the benefits provided by this law had such occurred within this state, such employee, or, in the event of his death resulting from such injury or disease, his dependents, shall be entitled to the benefits provided by this law, provided that at the time of the accident causing such injury, or at the time of manifestation of such disease:

(1) His employment is principally localized in this state; or

(2) He is working under a contract of hire made in this state in employment not principally localized in any state; or

(3) He is working under a contract of hire made in this state in employment principally localized in another state, the workmen's compensation law of which is not applicable to his employer; or

(4) He is working under a contract of hire made in this state for employment outside the United States and Canada. [I.C., § 72-217, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Cross References.** — Coverage for injuries outside state presumed in contract of hiring, § 72-221.

Interstate commerce, § 72-202.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**JUDICIAL DECISIONS****Employment Principally Localized.**

Where, at the time of the accident which occurred in Ohio, employee of Idaho based employer was staying in motel at employer's expense, employer had not yet established a district office or any office of place of business in Ohio and employee was not transferred to status of district sales manager on employer's records until after the accident, employee's employment was still principally located in

Idaho and compensation laws of Idaho applied. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

Once a worker's employment is principally located in a state, it remains localized in that state until it becomes principally localized in another. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

**Cited in:** *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

**DECISIONS UNDER PRIOR LAW****ANALYSIS**

Injury out of state.  
Jurisdiction of board.

**Injury Out of State.**

The fact that an employee's injury occurred without the state did not ipso facto defeat his right to compensation. *Dameron v. Yellowstone Trail Garage*, 54 Idaho 646, 34 P.2d 417 (1934).

**Jurisdiction of Board.**

The statute providing that where a workman was hired outside of the state of Idaho, was injured and was entitled to compensation under the law of the state where he was hired, he was entitled to enforce against his employer his rights in Idaho did not limit the industrial accident board's jurisdiction to ac-

cidents occurring within the state, if the employment was so connected with the employer's business within the state as to be an integral part thereof. *Johnson v. Falen*, 65 Idaho 542, 149 P.2d 228 (1944).

Where an employee was hired outside of the state of Idaho and was injured outside of the state, but his employment was inseparably incidental to the employer's business of buying, shipping, and selling fruit, the situs of which was in Idaho, the industrial accident board of Idaho has jurisdiction of the employee's claim for compensation. *Johnson v. Falen*, 65 Idaho 542, 149 P.2d 228 (1944).

**72-218. Award subject to credit for benefits furnished or paid under laws of other jurisdictions.** — The payment or award of benefits under the workmen's compensation law of another state, territory, province or foreign nation to an employee or his dependents otherwise entitled on account of such injury, occupational disease or death to the benefits of this law shall not be a bar to a claim for benefits under this law, provided that claim under this law is filed within two (2) years after the accident causing such injury, or manifestation of such disease, or death. If compensation is paid or awarded under this law:

(1) The medical and related benefits furnished or paid by the employer under such other workmen's compensation law on account of such injury, occupational disease, or death shall be credited against the medical and related benefits to which the employee would have been entitled under this law, had claim been made solely under this law;

(2) The total amount of all income benefits paid or awarded the employee under such other workmen's compensation law shall be credited against the total amount of income benefits which would have been due the employee had claim been made solely under this law;

(3) The total amount of death benefits paid or awarded under such other workmen's compensation law shall be credited against the total amount of death benefits payable under this law. [I.C., § 72-218, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**JUDICIAL DECISIONS**

**Cited in:** *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

**72-219. Injuries in transitory employment in Idaho.** — (1) If an employee is entitled to the benefits of this law by reason of an injury sustained or occupational disease contracted in this state in employment by an employer who is domiciled in another state and who has not secured the

payment of compensation as required by this law, the employer or his surety may file with the commission a certificate, issued by the board, commission, officer or agency of such other state having jurisdiction over workmen's compensation claims, certifying that such employer has secured the payment of compensation under the workmen's compensation law of such other state and that with respect to said injury or disease such employee is entitled to the benefits provided under such law; and shall also file with the commission an irrevocable power of attorney, in form approved by the commission, designating a person or corporation domiciled in this state as his or its attorney-in-fact for acceptance of process in any proceeding brought by such employee or his dependents to enforce his or their rights under this law;

(2) If such employer is a qualified self-insurer under the workmen's compensation law of such other state, such employer shall, upon submission of evidence satisfactory to the commission of his ability to meet his liability to such employee under this law, be deemed to be a qualified self-insurer under this law;

(3) If such employer's liability under the workmen's compensation law of such other state is insured, such employer's surety, as to such employee or his dependents only, shall be deemed to be an insurer authorized to write insurance under and be subject to this law, provided, however, that unless the contract with said employer requires it to pay an amount equivalent to the compensation benefits provided by this law, its liability for income benefits or for medical and related benefits shall not exceed the amounts of such benefits for which such insurer would have been liable under the workmen's compensation law of such other state;

(4) If the total amount for which such employer's insurer is liable under the subdivisions (2) and (3) is less than the total of the compensation benefits to which such employee is entitled under this law, the commission, if it deems necessary, may require the employer to file security, satisfactory to the commission, to secure the payment of benefits due such employee or his dependents under this law; and

(5) Upon compliance with the preceding requirements of this section such employer, as to such employee and his dependents only, shall be deemed to have secured the payment of compensation under this law. [I.C., § 72-219, as added by 1971, ch. 124; § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

#### RESEARCH REFERENCES

**C.J.S.** — 99 C.J.S., Workers' Compensation, § 79.

**72-220. Locale of employment.** — (1) A person's employment is principally localized in this or another state when:



(a) His employer has a place of business in this or such other state and he regularly works at or from such place of business; or

(b) He is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

(2) An employee whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another such state, and, unless such other state refuses jurisdiction, such agreement shall be given effect under this law. [I.C., § 72-220, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### ANALYSIS

Domicile.

Employment principally localized.

#### **Domicile.**

For a change of domicile to occur, the fact of physical presence at a dwelling place and the intention to make it a home must concur. And when such domicile is established, it persists until another is legally acquired. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

district office or any office or place of business in Ohio and employee was not transferred to status of district sales manager on employer's records until after the accident, employee's employment was still principally located in Idaho and compensation laws of Idaho applied. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

#### **Employment Principally Localized.**

Where, at the time of the accident which occurred in Ohio, employee of Idaho based employer was staying in motel at employer's expense, employer had not yet established a

Once a worker's employment is principally located in a state, it remains localized in that state until it becomes principally localized in another. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

**72-221. Coverage for injuries or occupational diseases outside state presumed.** — An employer who hires workmen within this state to work outside the state may agree with such workmen that the remedies under this act shall be exclusive as to injuries received and occupational diseases contracted outside this state arising out of and in the course of such employment, and all contracts of hiring in this state shall be presumed to include such an agreement. [I.C., § 72-221, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-222. Reciprocal recognition of extraterritorial coverage with other jurisdictions.** — For the purpose of effecting mutually satisfactory

reciprocal arrangements with other states respecting extraterritorial jurisdictions, the commission is empowered to promulgate special or general regulations not inconsistent with the provisions of this law and, with the approval of the governor, to enter into reciprocal agreements with appropriate boards, commissions, officers or agencies of other states having jurisdiction of workmen's compensation claims. [I.C., § 72-222, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### **Choice of Law.**

Where both plaintiffs and defendant were Idaho residents and the tort took place in Idaho, Idaho had strong interests and policies which would have been undermined by the

application of the less equitable Washington laws, therefore, the court chose to apply the law of Idaho, the forum state. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

**72-223. Third party liability.** — (1) The right to compensation under this law shall not be affected by the fact that the injury, occupational disease or death is caused under circumstances creating in some person other than the employer a legal liability to pay damages therefor, such person so liable being referred to as the third party. Such third party shall not include those employers described in section 72-216, Idaho Code, having under them contractors or subcontractors who have in fact complied with the provisions of section 72-301, Idaho Code; nor include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workmen there employed.

(2) Action may be instituted against such third party by the employee, or in event compensation has been claimed and awarded, by the employee and employer jointly, in the employee's name, or, if the employee refuses to participate in such action, by the employer in the employee's name.

(3) If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.

(4) Unless otherwise agreed, upon any recovery by the employee against the third party, the employer shall pay or have deducted from its subrogated portion thereof, a proportionate share of the costs and attorney's fees incurred by the employee in obtaining such recovery unless one (1) or more of the following circumstances exist:

(a) If prior to the date of a written retention agreement between the employee and an attorney, the employer has reached an agreement with the third party, in writing, agreeing to pay in full the employer's subrogated interest;

(b) If the employee alleges or asserts a position in the third party claim adverse to the employer, then the commission shall have jurisdiction to determine a reasonable fee, if any, for services rendered to the employer;

(c) If there is a joint effort between the employee and employer to pursue a recovery from the third party, then the commission shall have jurisdiction to determine a reasonable fee, if any, and apportion the costs and attorney's fees between the employee and employer.

(5) If the amount recovered from the third party exceeds the amount of the subrogated portion payable to the employer for past compensation benefits paid, then to the extent the employer has a future subrogated interest in that portion of the third party recovery paid to the employee, the employer shall receive a credit against its future liability for compensation benefits. Such credit shall apply as future compensation benefits become payable, and the employer shall reimburse the employee for the proportionate share of attorney's fees and costs paid by the employee in obtaining that portion of the third party recovery corresponding to the credit claimed. The employer shall not be required to pay such attorney's fees and costs related to the future credit prior to the time the credit is claimed. However, the employer and employee may agree to different terms if approved by the industrial commission.

(6) If death results from the injury or occupational disease and if the employee leaves no dependents entitled to benefits under this law, the surety shall have a right of action against the third party for recovery of income benefits, reasonable expenses of medical and related services and burial expense actually paid by the surety and for recovery of amounts paid into the industrial special indemnity account pursuant to section 72-420, Idaho Code, and such right of action shall be in addition to any cause of action of the heirs or personal representatives of the deceased.

(7) All rights and restrictions herein granted to the employer have previously been intended to be, and are hereby expressly granted to the industrial special indemnity account. [I.C., § 72-223, as added by 1971, ch. 124, § 3, p. 422; am. 1981, ch. 261, § 1, p. 552; am. 1996, ch. 191, § 1, p. 599; am. 1999, ch. 52, § 1, p. 130; am. 2000, ch. 119, § 1, p. 258; am. 2000, ch. 372, § 1, p. 1231.]

#### STATUTORY NOTES

**Amendments.** — This section was amended by two 2000 acts — ch. 119, § 1 and ch. 372, § 1, both effective July 1, 2000, which do not conflict and have been compiled together.

The 2000 amendment, by ch. 119, § 1, substituted present subsection (4) for former subsection (4), which read: "On any recovery by the employee against a third party, the employer shall pay or have deducted from his subrogated portion thereof, a proportionate share of the costs and attorney's fees incurred by the employee in obtaining such recovery".

The 2000 amendment, by ch. 372, § 1,

substituted "agreeing to pay in full the employer's subrogated interest" for "acknowledging the third party's obligation to pay the subrogated interest" in subdivision (4)(a).

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 2 of S.L. 1996, ch. 191 provided that the act should be in full force and effect on and after July 1, 1996.

Section 2 of S.L. 2000, ch. 119 provided that the act shall be in full force and effect on and after July 1, 2000.



## JUDICIAL DECISIONS

## ANALYSIS

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**Apportionment of Damages.**

If an employee brings a suit against a third party in addition to receiving workmen's compensation benefits, the court will apportion the employee's damages between the employer and third party. The focus of the court in apportionment is two-fold: (1) to achieve an equitable distribution of liability for the employee's injuries as between the employer and the third party, based on the facts of each case, and (2) to prevent the overcompensation of an employee, i.e., to prevent the employee from retaining both the workmen's compensation benefits and the full tort recovery. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983).

**Attorneys' Fees and Costs.**

This section does not limit payment of attorneys' fees and costs to situations where there is or has been an administrative or judicial proceeding; this section applies to all circumstances where any recovery has been effectuated by the employee against a third party. A civil action is not a condition precedent to the application of subsection (4) of this section. *Walker v. Hensley Trucking*, 107 Idaho 572, 691 P.2d 1187 (1984).

The trial court correctly withheld injured passengers' attorney's fees and costs in distributing injured passengers' share of interpleaded fund to State Insurance Fund. *Lumbermens Mut. Cas. Co. v. Egbert*, 125 Idaho 678, 873 P.2d 1332 (1994).

The proportion of a surety's benefit in a third party recovery, and thus the surety's

proportionate share of the costs and fees, should be measured not only by the surety's past compensation liability which was reimbursed by the third party recovery, but also by the surety's future compensation liability which is absolved by the third party recovery. *Cameron v. Minidoka County Hwy. Dist.*, 125 Idaho 801, 874 P.2d 1108 (1994).

Surety was required to pay its proportionate share of the costs and attorney fees in an immediate lump sum, rather than over the same nine and one-half year period it would have paid the claimants' compensation benefits. *Cameron v. Minidoka County Hwy. Dist.*, 125 Idaho 801, 874 P.2d 1108 (1994).

The legislature did not intend that a worker should be able to bring a bad faith tort action against his employer's surety in courts of general jurisdiction, but rather that a worker could receive attorney fees and sometimes punitive costs if the employer or surety acted unreasonably. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

**Co-Employees.**

In an action against employers arising out of a mine fire, employers' third-party complaint against unions in which employers alleged that unions were negligent in allowing unsafe conditions to exist in the mine was barred under this section, for union members, who were co-employees acting as agents for employers, were not third parties against whom a damage action could be maintained. *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976).

**Constitutionality.**

Rational basis exists for the grant of immunity in this section, even if the statutory employer has not had to pay benefits because the direct employer has. *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

**Construction.**

There is no indication in the workmen's compensation law of Idaho that the employer's negligence should be attributed to his employee. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

Given the statutory definition of employer under § 72-102(12)(a), the fact that this term and its applicable definition were imported almost word-for-word into this section, and there was no indication within the Idaho Worker's Compensation Act that the legislature intended to overturn years of case law, the statutory employer analysis should be used when determining the plain meaning of this section; the court finds the meaning of that section clear and unambiguous. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Court rejected an employee's claim that this section of the Idaho Worker's Compensation Act violated the Equal Protection Clause because the employee made no attempt to clearly identify to the court the classification challenged, and instead the employee appeared to challenge the rationality of the entire statutory scheme, which was not appropriately considered an equal protection challenge. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Under this section, applying a more limited test to owners as opposed to subcontractors is supported by the express language and general purpose of the Idaho Worker's Compensation Act; it makes sense to have a rule that limits a property owner's liability under the statutory concept of "employer" under § 72-102(12)(a) while interpreting the contractor or subcontractor's liability more broadly. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

**Course of Employment.**

When the employee was employed by two employers and one employer was attempting to use the Workers' Compensation Law as a shield to avoid third-party liability, it was that employer's duty to prove that the employee was working for the employer when the accident occurred and the fact that the employee was subject to the direction and control of either employer at moment's notice was not determinative; what the employer had to prove as claimant was that the employee's injury arose out of and in the course of his employment with the employer. *Basin Land*

*Irrigation Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (1988).

**Employer as Third Party.**

This state's Workmen's Compensation Law does not shield an employer of an independent contractor from tort liability for an injury incurred by the independent contractor's employee. *Peone v. Regulus Stud Mills, Inc.*, 858 F.2d 550 (9th Cir. 1988).

Since status as a statutory employer was a defense to a common law negligence action, deciding whether a defendant was a third party or statutory employer necessarily attended the district court's task in ruling on matters in such suits. *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

**Exemption Not Automatic.**

The status of a statutory employer does not exempt all such employers from tort liability as third parties under this section, since the exclusive liability of an employer under § 72-209(1), and the exclusive remedies of an employee under § 72-211, are both specifically made "subject to the provisions of section 72-223." *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

**Immunity.**

Because a property owner was not in the business of construction or roof installation and did not employ individuals who were trained in these areas, nor did it own materials or equipment necessary to engage in these areas, the owner was not a statutory employer under § 72-102(12)(a) of the Idaho Worker's Compensation Act and thus was not exempt from liability under this section in connection with a roof installation employee's third party negligence action; thus, the trial court erred in granting the owner summary judgment under Idaho R. Civ. P. 56(c). *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

Trial court correctly determined that a general contractor was immune from third-party tort liability pursuant to this section of the Idaho Worker's Compensation Act as a general contractor, given the definitions of employer under §§ 72-216, 72-102(12)(a), and thus summary judgment under Idaho R. Civ. P. 56(c) was properly granted in the contractor's favor. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003).

The grant of immunity under this section comes only in connection with absolute liability on the part of the primary contractor or business operator to provide benefits under the Worker's Compensation Act if an employee's direct employer fails to do so. The fact that the primary employer may keep this grant of immunity even though the direct employer has paid benefits and fulfilled its obligations under the law does not render the provision unconstitutional. *Venters v.*



Sorrento Del., Inc., 141 Idaho 245, 108 P.3d 392 (2005).

Trial court erred in finding that a farm, as a mere landowner, was a decedent's statutory employer, because nothing in the record indicated that the farm was engaged in the business of hauling wastewater for pecuniary gain, which was the work being done by the decedent. The farm was not a statutory employer and was not entitled to the immunity provided by this section. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

Trial court properly granted summary judgment to a factory in a wrongful death action against it by a decedent's survivors because the factory qualified as the decedent's statutory employer, pursuant to §§ 72-102(12)(a), 72-216(1), due to its contractual relationship with the decedent's employer for wastewater hauling services. The factory was immune from third-party tort liability under this section of the Idaho Worker's Compensation Act. *Venters v. Sorrento Del., Inc.*, 141 Idaho 245, 108 P.3d 392 (2005).

### In General.

An injured employee may receive workmen's compensation benefits and thereafter bring a negligence action against a third party tort-feasor who was a nonemployer. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

Where it was undisputed that the respondents contracted the services of the worker's direct employer, they were therefore an employer within the meaning of that term. *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

### Jurisdiction.

Since question of whether State Insurance Fund (SIF) was entitled to subrogation pursuant to subsection (3) of this section is a question arising under the worker's compensation law which is within the exclusive jurisdiction of the Industrial Commission, district court had no jurisdiction. *Idaho State Ins. Fund ex rel. Forney v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1997).

### —Industrial Commission.

Where injured worker appellant and spouse appealed the decision of the trial court dismissing their claims against the Idaho Department of Transportation's worker's compensation surety (SIF) for lack of subject matter jurisdiction and dismissing their waiver of subrogation claim against SIF pursuant to subsection (3) of this section because of SIF's pending action against the appellant's attorney, the Supreme Court held that appellants presented claims arising under § 72-804 and that under § 72-707 the Industrial Commission had exclusive jurisdiction of all questions arising under the workers' compen-

sation law. *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

Injured worker's claim that employer's workers' compensation surety had waived its subrogation rights arose under subsection (3) of this section, and, as such, was a question within the exclusive jurisdiction of the Industrial Commission under § 72-707. *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

### Limitation on Employer's Liability.

A third party who has paid damages for an injury arising out of the employment of the injured person may hold the employer liable if the injury was concurrently caused by the breach of any duty or obligation owed by the employer to such other person, but the employer's liability shall be limited to the amount of compensation for which the employer is liable under workmen's compensation. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

### Parent Corporation.

Where the stock interest held by a corporation in the direct employer of an injured employee, when viewed in light of the record and the appropriate law, did not require the setting aside or the piercing of the corporate veil, the corporation did not meet Idaho's statutory workmen's compensation definition of "employer"; hence, the lower court holding that the corporation was not a "statutory employer" such as to immunize it from a negligence action as a "third party" was correct. *Tucker v. Union Oil Co.*, 100 Idaho 590, 603 P.2d 156 (1979).

### Present Value of Future Liability.

Where the commission was instructed to determine, or have the parties stipulate, how much the present value of the claimants' future compensation should have been discounted in consideration of the contingency that the claimants might die or marry at some point during the remainder of the nine and one-half year payment period, the total amount of the benefit to be paid out over about nine and one-half years should not only have been discounted to its present value, it also should have been discounted based on the contingent nature of those claimants' rights to receive those benefits. *Cameron v. Minidoka County Hwy. Dist.*, 125 Idaho 801, 874 P.2d 1108 (1994).

### Reduction in Claimant's Award.

It was not erroneous for the trial court to reduce claimant's award by the amount of the workmen's compensation benefits received by him where a reimbursement did not inure to the benefit of a negligent employer since the employer and third party arrived at a mutual agreement of their respective liability by vir-



tue of their release agreement and this agreement relieved the court from litigating the issue of the employer's negligence, without prejudicing claimant's recovery and where to allow claimant to retain both the workmen's compensation benefits and the full tort recovery, would be overcompensatory. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983).

### **Reduction of Verdict.**

#### **— Compensation Benefits.**

Any verdict in an action by an employee against a third party must be reduced by the amount of the worker's compensation benefits paid to the employee; however, a trial court is not permitted to reduce a verdict to reflect future due compensation benefits. *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993).

### **Scope of Employment.**

Where the employee was in an automobile accident with the president of one of his employers, and that employer was attempting to use the Workers' Compensation Law as a shield to avoid third-party tort liability, the burden was on the employer to prove by a preponderance of the evidence that the employee was operating in the scope of his employment when the accident occurred; if the employer failed to meet its burden, then the workers' compensation laws would not apply and the employee would be free to pursue a third-party civil action against the employer and its president in district court. *Basin Land Irrigation Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (1988).

### **Single Cause of Action.**

There is but one cause of action under this section, and one right to subrogation, and if the action is brought in the employee's name, the employer and its surety are bound by estoppel to the results of that trial conducted by the employee. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

When claimant brought a separate action against a third-party for injuries, the subrogation rights of employer who voluntarily paid worker's compensation benefits was derivative of claimant's recovery, and employer was not required to file separate tort claim against third-party to preserve their right to subrogation. *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 992 P.2d 164 (1999).

### **Subcontractors.**

Employer food service supplier was immune to liability for injuries received by an employee of its subcontractor, because the subcontractor had properly provided workers' compensation coverage for its employees.

*Gonzalez v. Lamb Weston, Inc.*, — Idaho —, 124 P.3d 996 (2005).

### **Subrogation.**

Where a full hearing of the "loaned employee" issue would occur in pending tort action between injured employee plaintiff and defendant employer of employees who injured plaintiff, the interests of defendant were fully protected from any further suits by the plaintiff's employer or its surety through the subrogation provisions of this section and it was proper for the district court under I.R.C.P. 57 to dismiss a declaratory judgment action in order to avoid a multiplicity of suits. *Scott v. Agricultural Prods. Corp.*, 102 Idaho 147, 627 P.2d 326 (1981).

Where the employer is not negligent, the employer is entitled to subrogate to the employee's recovery against a third party, and thus obtain a reimbursement of the workmen's compensation benefits he paid; conversely, in those situations where the employer is negligent, the employer is denied this reimbursement and the third party is entitled to a credit against his judgment in the amount of the workmen's compensation benefits the employer paid. Thus, the employee's award is reduced by the amount of workmen's compensation he received; in either event, the employee does not retain both the workmen's compensation benefits and the full tort recovery. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983).

Where third party paid consideration for release of any claim employer may have had based on the accident, employer's subrogation rights were extinguished and third party became subrogated to employer's right of reimbursement. Thus, in the event employer's negligence was litigated, and employer was found not negligent, third party held employer's right to be reimbursed for the workmen's compensation benefits paid; conversely, in the event employer was found negligent, third party retained its right to receive a credit towards his judgment, in the amount of the workmen's compensation benefits paid. Therefore, in the posture of such case, the determination of the employer's negligence was unnecessary. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983).

The insurer of an employer who is jointly negligent with a third party is not allowed the statutory subrogation rights or reimbursement for workmen's compensation benefits paid to the injured employee allowed by subsection (3) of this section; the third party may defend on the basis that the employer was negligent whether or not the employer is a party to the action. *Runcorn v. Shearer Lumber Prods., Inc.*, 107 Idaho 389, 690 P.2d 324 (1984).

Where the record was devoid of any find-

ings or testimony as to the medical expense incurred due to medical malpractice, the Industrial Commission's order of an offset of the claimant's total award to the workers' compensation surety pursuant to this section for payments made for the claimant's medical expenses due to the medical malpractice was reversed and remanded for further proceedings to determine the surety's subrogation rights, with recovery from the malpractice settlement in excess of the surety's expenditures in connection therewith to remain in the claimant. *Presnell v. Kelly*, 113 Idaho 1, 740 P.2d 43 (1987).

Insurance company had a subrogated interest in party's settlement for injuries sustained in a work-related accident because the unilateral actions of employee and third-party could not restrict the subrogation rights of employer who voluntarily paid worker's compensation benefits. *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 992 P.2d 164 (1999).

### **Temporary Employee.**

Lumber company which hired employee from a temporary employment agency, under

an agreement that referred to the employee as a "general employee" of employment agency and a "special employee" of the lumber company and which specified that employee was under the exclusive supervision and control of lumber company while on the job site, was not a third party who was liable for employee's injuries under this section. *Lines v. Idaho Forest Indus.*, 125 Idaho 462, 872 P.2d 725 (1994).

**Cited in:** *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir. 1978); *Pocatello Indus. Park Co. v. Steel W., Inc.*, 101 Idaho 783, 621 P.2d 399 (1980); *Wilder v. Redd*, 111 Idaho 141, 721 P.2d 1240 (1986); *Barringer v. State*, 111 Idaho 794, 727 P.2d 1222 (1986); *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987); *Sherrard v. City of Rexburg*, 113 Idaho 815, 748 P.2d 399 (1988); *State Ins. Fund v. Jarolimek*, 139 Idaho 137, 75 P.3d 191 (2003).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

Borrowed servant.

Co-employees.

Construction.

Division of recovery.

Effect of election.

Extent of third party's liability.

Federal government not employer.

Instructions.

Joint liability.

Malpractice by employer's physician.

Right to elect.

Subrogation.

—Parties.

Tort liability.

### **Borrowed Servant.**

Park, being the loaned servant of the trucking company for the purpose of aiding in the unloading of boilers he was transporting, at the time of the accident and injury to plaintiff occurring while Park was driving truck out from under boiler as it was being elevated under direction of plaintiff, plaintiff's exclusive remedy was compensation under the Workmen's Compensation Law. *Cloughley v. Orange Transp. Co.*, 80 Idaho 226, 327 P.2d 369 (1958).

A trucker delivering logs to claimant's employer, who normally had the responsibility of unloading the logs with the assistance of a pettibone machine, of which claimant was an operator, who at claimant's direction undertook to unload the logs without the assistance

of the pettibone machine because it was disabled, was, in such operation a loaned employee of claimant's employer and, therefore, a fellow servant of claimant, and not a third party liable for injury resulting to claimant from a log rolling from the truck and striking him. *Gropp v. Pluid*, 91 Idaho 722, 429 P.2d 852 (1967).

### **Co-employees.**

An employee acting in the scope of employment, who injured a fellow employee could not be sued for damages, since the exemption extended to the employer from suits for damages was also extended to an employee acting as agent for his employer. *White v. Ponzozzo*, 77 Idaho 276, 291 P.2d 843 (1955).

A co-employee acting in the scope of his employment who injured a fellow employee



was not a "third party" within the purview of the statute and could not be sued for damages, since the exemption extended to the employer was also extended to an employee acting as agent for his employer. *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

### Construction.

Where a third party injured an employee, he could not urge that he was not liable because the employee was a minor member of the employer's family, dwelling in his house, and that the employer had not, prior to the accident, filed with the industrial accident board an election in writing that the provisions of the Workmen's Compensation Law should apply to the injured employee, where it was shown that compensation had been paid under an agreement between employer and his insurance carrier and the employee and approved by the industrial accident board. *Department of Finance v. Union Pac. R.R.*, 61 Idaho 484, 104 P.2d 1110 (1940).

The provision of the Workmen's Compensation Act reciting its purpose, and the provision permitting an injured employee at his option to claim compensation or to proceed against a third person, and subrogating any employer who had paid compensation to the rights of the employee, were in pari materia, and must have been considered and construed together. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940).

The Workmen's Compensation Act was remedial and special law providing compensation for injured employees without referring to negligence on the part of either employer or employee. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940).

A workman employed by a subcontractor digging sewer trenches for a general contractor building sewers for a city was an employee of the general contractor and not of the city, and the general contractor was answerable rather than the city for the death of the workman in the course of his employment through the negligence of the subcontractor, and the heirs could not maintain an action other than that provided by the Workmen's Compensation Law against the general contractor. *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

Because liability of employer and surety for compensation was separate and distinct from liability of third party tortfeasor, employer's right of subrogation would not have existed except for the statute. *Lake v. State*, 71 Idaho 107, 227 P.2d 361 (1951).

Where cement wall erected by contractor was not attached to its footing, was not braced, and was new and green, an employee of contractor constructing forms near wall who was injured when wall collapsed was not entitled to recover damages from another

contractor whose employee at the time of the accident was engaged in backfilling against the wall with a bulldozer. *Benson v. Brady*, 73 Idaho 553, 255 P.2d 710 (1953).

The remedy of compensation was exclusive in all cases of injuries sustained by employees except as to right of action for damages against third parties. *White v. Ponozzo*, 77 Idaho 276, 291 P.2d 843 (1955).

In suit to recover for injuries when employee of construction company hired by the state for the construction of a stretch of road which was to be kept open to the traveling public, was run down in his duties as checker by defendant driver who was driving under the influence of intoxicants, it was held at the joint negligence of the contractor and automobile driver and they were liable for the injuries, the highway contractor being negligent in not erecting warning signals at site of the work being done. *Hoffman v. Barker*, 79 Idaho 349, 317 P.2d 335 (1957).

Former section regarding liability of third parties permitted an employee or his heirs to receive workmen's compensation benefits and thereafter bring a cause of action against the third-party tortfeasor. *Hall v. Young's Dairy Prods. Co.*, 98 Idaho 562, 569 P.2d 907 (1977).

### Division of Recovery.

Where recovery by dependents against a third person for death of an employee was for a greater sum than had been paid out as workmen's compensation by the employer and insurance carrier, the court should have directed payment to employer and insurance carrier of amount paid out by them to the dependents, and when the parties could not agree upon the amount thus paid out, an application should have been made supported by a certified copy of the policy of insurance, the summary of the award by the industrial accident board, and the compensation agreement. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940).

### Effect of Election.

Where dependents of deceased employee claimed and accepted compensation under statute, all rights and remedies against third person causing injury were barred insofar as such dependents were concerned. *Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R.*, 45 F.2d 885 (D. Idaho 1930). But see, *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940) and *O'Connell v. Ivankovich*, 62 Idaho 328, 111 P.2d 888 (1941).

The acceptance of workmen's compensation for the death of an employee did not preclude his children from maintaining an action for damages against a third party whose negligence allegedly caused the death. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940). But see, *Workmen's Comp. Exch. v. Chicago*,



M., St. P. & Pac. R.R., 45 F.2d 885 (D. Idaho 1930).

Employee of county was entitled to bring third party action against construction company engaged in building new bridge for damages sustained as result of injuries caused by negligent operation of dragline by employee of construction company while removing debris of old bridge torn down by county. *Brown v. Arrington Constr. Co.*, 74 Idaho 338, 262 P.2d 789 (1953).

An employee who claimed compensation benefits before suing employer for damages did not make an election, since compensation was the exclusive remedy. *White v. Ponzozzo*, 77 Idaho 276, 291 P.2d 843 (1955).

### **Extent of Third Party's Liability.**

The liability or amount of liability of the tort-feasor was not dependent upon the amount of compensation awarded or the fact that compensation had been awarded the injured employee, as was true in some jurisdictions, and in which case the tort-feasor would have been vitally interested; neither recovery nor the amount of damages recoverable from the tort-feasor was controlled or fixed in any way by the amount of the award made by the board, but was based upon the damages sustained by the injured employee by reason of the negligence of the tort-feasor. *Department of Finance v. Union Pac. R.R.*, 61 Idaho 484, 104 P.2d 1110 (1940).

### **Federal Government Not Employer.**

The United States was not an "employer" within the meaning of the Workmen's Compensation Act so as to bar an action under the wrongful death statute where a workman of the general contractors for a flood control project for the United States fell from a scaffold, and exemption of an "employer" from common law or statutory action for negligence did not apply. *Kirk v. United States*, 232 F.2d 763 (9th Cir. 1956).

### **Instructions.**

In suit for damages by employee of one contractor against another contractor based on collapse of wall while back-filling was being done by defendant's employee with a bulldozer, an instruction on unavoidable accident was proper. *Benson v. Brady*, 73 Idaho 553, 255 P.2d 710 (1953).

### **Joint Liability.**

Although the statute did not provide for the situation wherein the negligence of the statutory employer was the sole, proximate cause of the injuries suffered by the employee, there was nothing to deprive the actual employer from obtaining indemnity or reimbursement from the negligent statutory employer to the extent of the compensation for which the actual employer was liable under this act.

*Industrial Indem. Co. v. Columbia Basin Steel & Iron, Inc.*, 93 Idaho 719, 471 P.2d 574 (1970).

### **Malpractice by Employer's Physician.**

Injured employee could not recover from employer's physician for injury resulting from negligence of physician. *Roman v. Smith*, 42 F.2d 931 (D. Idaho 1930). *Contra*, *Hancock v. Halliday*, 65 Idaho 645, 150 P.2d 137 (1943), appeal after remand, 67 Idaho 119, 171 P.2d 333 (1946).

Where, after injury, employee was further injured by doctor employed by employer's compensation insurance carrier while undergoing examination for carrier's benefit, he had no right of action against the insurance carrier unless such injury did not arise out of and in the course of employment and was not compensable under Idaho Workmen's Compensation Act, or injury was sustained under circumstances as to create liability in one other than his employer. *Schulz v. Standard Accident Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954).

Where physician hired by employer to treat injured employee was guilty of alleged malpractice resulting in amputation of employee's leg, employee could maintain action for damages against physician regardless of compensation received by employee from his employer. *Hancock v. Halliday*, 65 Idaho 645, 150 P.2d 137 (1943), appeal after remand, 67 Idaho 119, 171 P.2d 333 (1946). *Contra*, *Roman v. Smith*, 42 F.2d 931 (D. Idaho 1930).

### **Right to Elect.**

Where injury was caused by third person, dependents of deceased employee might claim compensation under the statute or proceed at law to recover damages against such third person. *Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R.*, 45 F.2d 885 (D. Idaho 1930).

Neither employer nor his workmen's compensation insurance carrier was "some other person than the employer" within the meaning of the Idaho Workmen's Compensation Act which allowed the option of bringing of an action for damages against person other than the employer. *Schulz v. Standard Accident Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954).

Actions of an employee, his heirs or personal representatives against a third person to recover damages for personal injuries or death sustained by reason of actionable negligence of such party were not abolished by this statute, the provisions of the statute being expressly confined to those occupying the relationship of employee and employer. *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948); *Clearwater Timber Protective Ass'n v. District Court*, 84 Idaho 129, 369 P.2d 571 (1962).

### Subrogation.

Employer's failure to intervene in employee's action against third party tortfeasor, prospective subrogee, indicated action to be with consent of employer so that decision was without prejudice to employer. Hence jurisdiction of industrial accident board over original claim was not divested nor was employee's claim barred by the action against third party. *Lake v. State*, 71 Idaho 107, 227 P.2d 361 (1951).

An employer or his surety cannot recover against a third party tortfeasor for compensation paid to an employee for injuries resulting from concurring negligence of the employer and such third party. *Liberty Mut. Ins. Co. v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966).

It was not the intent of the legislature in former law providing for third party liability to allow an injured workman a double recovery and where a third party was liable to pay for the damages sustained by claimant who effected a settlement before a compensation award was made, the employer and surety were entitled to be subrogated to the third party settlement obtained by claimant and should have been allowed a credit against their obligation to claimant in the amount of the settlement. *Shields v. Wyeth Laboratories, Inc.*, 95 Idaho 572, 513 P.2d 404 (1973).

In action against elevator company by employer and employer's workmen's compensation insurer seeking damages by subrogation for workmen's compensation benefits paid to employee who received injuries when he fell down an elevator shaft after elevator car's floor gave way, employer and its surety were barred from recovering damages by employer's contributory negligence in failing to inspect and maintain the elevator. *McDrummond v. Montgomery Elevator Co.*, 97 Idaho 679, 551 P.2d 966 (1976).

Under former section regarding liability of third parties, the employer and its carrier were entitled to subrogation against the proceeds of a wrongful death recovery from a third-party tortfeasor except to the extent that such recovery exceeded their expenses in pursuing the action and the workmen's compensation benefits they had paid or were liable to pay. *Hall v. Young's Dairy Prods. Co.*, 98 Idaho 562, 569 P.2d 907 (1977).

Where an employer's carrier paid workmen's compensation benefits of over \$21,000 to the surviving spouse and children of an employee killed in the course of his employment, the employer and carrier were

subrogated to the survivor's rights in a wrongful death action against a third-party tortfeasor and were entitled to the \$10,000 recovery less an award of \$2,000 to cover the survivors' attorney's fees. *Hall v. Young's Dairy Prods. Co.*, 98 Idaho 562, 569 P.2d 907 (1977).

### —Parties.

Dependents of deceased employee who have elected to claim and have accepted compensation under statute could not be joined with employer and insurer in action against third party causing injury. *Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R.*, 45 F.2d 885 (D. Idaho 1930). But see, *Contra: Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940) and *O'Connell v. Ivankovich*, 62 Idaho 328, 111 P.2d 888 (1941).

Employer and insurer paying compensation claim can join in action against third person causing injury. *Workmen's Comp. Exch. v. Chicago, M., St. P. & Pac. R.R.*, 45 F.2d 885 (D. Idaho 1930).

In an action against a third party for injury to, or death of, an employee, where an award had been made under the Workmen's Compensation Act, and the employer and insurance carrier appeared as plaintiffs, the court may have instructed that the employer and insurance carrier appear as and were proper parties plaintiff because of the fact that they had been subrogated to the rights of the employee or his beneficiaries, because of their liability to pay benefits under the act, and that the jury would have nothing to do with the question of what amount such plaintiffs may have been liable for under the act, and the liability under the act was not dependent on negligence as in the action against third party. *Lebak v. Nelson*, 62 Idaho 96, 107 P.2d 1054 (1940).

### Tort Liability.

In a diversity action against phosphate producer by employee of subcontractor to recover for personal injuries sustained in the construction of a furnace where there was no showing that the owner of the plant normally did that kind of construction, the assembly of the furnace was the construction business of the subcontractor, and the phosphate producer was not immune from tort liability since he was not the virtual proprietor or operator of such construction business. *Ray v. Monsanto Co.*, 420 F.2d 915 (9th Cir. 1970).

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 84 et seq.

**C.J.S.** — 100 C.J.S., Workers' Compensation, § 740 et seq.



**A.L.R.** — Right to maintain action against fellow employee for injury or death covered by workmen's compensation. 21 A.L.R.3d 845; 57 A.L.R.4th 888.

Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award. 28 A.L.R.3d 1066.

## **72-224. Nonresident alien dependents. [Repealed.]**

### **STATUTORY NOTES**

**Compiler's Notes.** — This section which comprised I.C., § 72-224 as added by 1971, ch. 124, § 3, p. 422 was repealed by S.L. 1978, ch. 264, § 22.

**72-225. Minor employee.** — A minor working at an age legally permitted under the laws of this state shall be deemed sui juris for the purpose of this law, and no other person shall have any cause of action or right to compensation for an injury or occupational disease to such minor employee except as expressly provided in this law; but, in the event of a lump sum payment becoming due under this law to such minor employee, the management of the sum shall be within the jurisdiction of the courts, the same as other property of minors. [I.C., § 72-225, as added by 1971, ch. 124, § 3, p. 422.]

### **STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### **JUDICIAL DECISIONS**

#### **DECISIONS UNDER PRIOR LAW**

##### **ANALYSIS**

Construction.  
Validity.

#### **Construction.**

Provision that a minor working at an age legally permitted be deemed sui juris for the purpose of this act meant that a minor legally permitted to work could pursue his remedies under the act without a guardian and without let or hindrance of any other person, except in a case of a lump settlement. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

#### **Validity.**

Employment of minor though in violation of the Child Labor Law was not void, but created the relationship of employer and employee under the Workmen's Compensation Act. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

**72-226. Insane person's compensation payable to guardian.** — The compensation of a person who is insane shall be paid to his or her guardian. [I.C., § 72-226, as added by 1971, ch. 124, § 3, p. 422.]

**72-227. Doubtful rights subject to commission's determination.** — In case the employer is in doubt as to the respective rights of rival claimants he may apply to the commission to decide between them. [I.C., § 72-227, as added by 1971, ch. 124, § 3, p. 422.]



**72-228. Presumption favoring certain claims.** — (1) In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify, and where there is unrebutted prima facie evidence that indicates that the injury arose in the course of employment, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury arose out of the employment and that sufficient notice of the accident causing the injury has been given.

(2) This section shall not apply to any defense under section 72-208, Idaho Code. [I.C., § 72-228, as added by 1971, ch. 124, § 3, p. 422; am. 1997, ch. 274, § 3, p. 799.]

## JUDICIAL DECISIONS

### ANALYSIS

Alcohol withdrawal seizure.

Burden of proof.

Idiopathic fall.

Intoxication.

Out of and in the course of employment.

Rebuttable presumption.

—Medical evidence.

### Alcohol Withdrawal Seizure.

There was substantial, competent evidence to support the Industrial Commission's finding that an employee was injured as a result of an alcohol withdrawal seizure and that the workplace did not contribute to his injury. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993).

### Burden of Proof.

The burden of disproving wilful intent to injure himself or herself is not upon the claimant, but rather is in the nature of an affirmative defense, which, if raised by the employer, must be proved by a preponderance of the evidence by the employer. *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996).

### Idiopathic Fall.

An injury resulting from an idiopathic fall at the workplace does not arise out of employment and is not compensable under our worker's compensation system without evidence of some contribution from the workplace. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993).

### Intoxication.

A blood alcohol level of .117 percent was not sufficiently high to overcome the presumption contained in this section that employee's death was not occasioned by his intoxication. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

At hearing before the commission on claimant's application for full income benefits as the surviving widow of employee who was killed when his semi-truck overturned, the

expert testimony of a toxicologist regarding the effect of employee's .117 percent blood alcohol level on his ability to operate a motor vehicle was not necessarily binding on the commission which could have concluded that all of the evidence of employee's intoxication did not overcome statutory presumption that employee's death was not caused by his intoxication. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

In hearings on claimant's application for full income benefits as surviving widow of employee who was killed when his semi-truck overturned, the commission did not err in its conclusion that there was a lack of substantial evidence in the record that employee's death was caused by intoxication, even though test results revealed that decedent had .117 percent blood alcohol level, where truck stop proprietors testified that employee's behavior was normal and that he did not appear to be intoxicated. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

In view of the presumption contained in this section that an employee's death was not occasioned by his intoxication, a finding by the commission that employee was intoxicated did not lead to an inevitable conclusion that the intoxication caused the fatal accident. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

### Out of and In the Course of Employment.

Where widow of deputy sheriff shot when he resisted arrest did not present sufficient evidence to indicate that husband's death arose in the course of his employment the

Commission was correct in not applying this section. *Kessler ex rel. Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997).

**Rebuttable Presumption.**

Once an employer has come forward with substantial affirmative evidence to indicate that an accident did not arise out of the employment, the burden shifts back to an employee to persuade the Industrial Commission that it did indeed arise out of the employment. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993).

While negative evidence alone will not defeat the statutory presumption contained in this section, this evidence may still be considered along with substantial affirmative evidence in evaluating whether substantial evidence has been presented to rebut the statutory presumption. *Evans v. Hara's, Inc.*, 123 Idaho 473, 849 P.2d 934 (1993).

**—Medical Evidence.**

A letter from a cardiovascular surgeon, that employee's stroke had no cause or relation-

ship with his employment, did not constitute substantial evidence contrary to the presumption that the employee's injury arose out of his employment; the industrial commission noted that the foundation of the surgeon's opinion was unknown. *Politte v. DOT*, 126 Idaho 270, 882 P.2d 437 (1994).

Surgeon's letter offered as medical evidence was not sufficiently substantial to overcome the presumption contained in this section that employee's injury arose out of his employment. *Politte v. DOT*, 126 Idaho 270, 882 P.2d 437 (1994).

The testimony of an employee's supervisors that employee's stroke had no causal connection to his work was not sufficient to prevent the application of the presumption contained in this section because the evidence that may be considered for this purpose must be medical evidence; the causal relationship of an injury to the claimant's employment must be supported by at least some medical proof. *Politte v. DOT*, 126 Idaho 270, 882 P.2d 437 (1994).

**72-229. Surety estopped to deny coverage.** — (1) Notwithstanding the provisions of sections 72-204 and 72-205, Idaho Code, a surety which issues to an employer a policy of workers' compensation insurance and collects a premium based upon moneys paid or to be paid a worker, or a self-insured employer which receives consideration from a worker to cover the cost of workers' compensation coverage, shall not be permitted to plead and raise the defense that the worker, at the time of the occurrence of the industrial accident or manifestation of the occupational disease, was an independent contractor and not an employee of the surety's insured employer or of the self-insured employer.

(2) In the event that at the time of the industrial accident or manifestation of an occupational disease the worker has obtained security for payment of compensation as provided under this law, the provisions of subsection (1) of this section shall not apply.

(3) Nothing in this section shall be construed to negate any prohibition contained in section 72-318, Idaho Code. [I.C., § 72-229, as added by 1992, ch. 193, § 1, p. 602.]

**72-230. Public assistance — Coverage.** — (1) Any employer who enters into a written agreement with the Idaho department of health and welfare to provide unpaid work experience, training, or both, to any person receiving public assistance benefits, shall be the "on-site employer" and shall be granted all the protections and immunities granted to any employer under the Idaho worker's compensation law.

(2) Any person receiving public assistance benefits pursuant to chapter 2, title 56, Idaho Code, who participates in unpaid work experience, training, or both, shall be deemed to be an employee of the "on-site employer" defined in subsection (1) of this section and shall be entitled to all benefits under the Idaho worker's compensation law.



(3) Any worker's compensation premiums and losses associated with unpaid work experience or training pursuant to this section shall be assessed against the Idaho department of health and welfare. All protections and immunities granted to any employer under the Idaho worker's compensation law shall be extended simultaneously to the "on-site employer" defined in subsection (1) of this section and the department of health and welfare. [I.C., § 72-230, as added by 1996, ch. 39, § 1, p. 102.]

## CHAPTER 3

### SECURITY FOR COMPENSATION

#### SECTION.

72-301. Security for payment of compensation.

72-302. Regulation of deposit with state treasurer.

72-303. Qualification subject to regulation.

72-304. Prompt compensation payments required — Rules and regulations.

72-305. Claims services and medical supervision.

72-306. Recitals in insurance contracts.

72-306A. Deductible contract.

72-307. Knowledge of employer to affect surety.

72-308. Insolvency of employer not to release surety.

72-309. Insurance contract deemed reformed.

72-310. Misrepresentation not to affect employee's rights.

72-311. Notice of security — Cancellation of surety contract.

72-312. Posting of notice regarding insurance — Penalty.

72-313. Payment pending determination of policy coverage.

72-314. Payment of liability of public employer.

72-315. Erroneous payment in good faith.

72-316. Voluntary payments of income benefits.

72-317. Periodical payments.

72-318. Invalid agreements — Penalty.

#### SECTION.

72-319. Penalty for failure to secure compensation.

72-320. Compensation preferred as wages.

72-321. Statutory agent of employer who has no business locale.

72-322. Assigned risk.

72-323. Creation of industrial special indemnity fund.

72-324. Management of industrial special indemnity fund.

72-325. State treasurer custodian of fund — Duties.

72-326. Deposit and investment of fund — Interest.

72-327. Assessment — Method of calculation and proration — Time for payment.

72-328. Collection of delinquent assessments — Duty of attorney general — Penalties.

72-329. Disbursements.

72-330. Legal representation of fund.

72-331. Payment of administrative expenses.

72-332. Payment for second injuries from industrial special indemnity account.

72-333. Perpetual appropriation.

72-334. Filing notice of claim with the industrial special indemnity fund — Time for filing — Records to be included with notice of claim — Jurisdictional effect. [Null and void June 30, 2008.]

**72-301. Security for payment of compensation.** — Every employer shall secure the payment of compensation under this law in one of the following ways:

(1) By insuring and keeping insured with a policy of workmen's compensation insurance as defined by section 41-506(d), Idaho Code, the payment of compensation with any surety authorized by the director of the department of insurance to transact such insurance, provided, that every public employer shall insure its liability for payment of compensation with the state insurance fund unless such fund shall refuse to accept the risk when the application for insurance is made; or



(2) An employer may become self-insured by obtaining the approval of the industrial commission, and by depositing and maintaining with the commission security satisfactory to the commission securing the payment by said employer of compensation according to the terms of this law. Such security may consist of a surety bond or guaranty contract with any company authorized to transact surety insurance in Idaho. The commission shall adopt rules and regulations governing the qualifications of self-insured employers, the nature and amount of security to be deposited with the commission, and the conditions under which an employer may continue to be self-insured.

No surety shall be permitted to transact workmen's compensation insurance covering the liability of employers under this law unless it shall have been authorized to do business under the laws of this state and until it shall have received the approval of the commission. To the end that the workmen secured under this act shall be adequately protected, the commission shall require such sureties to deposit and maintain with the treasurer of the state money or bonds of the United States or of this state, or interest-paying bonds when they are at or above par, or any other state of the United States or the District of Columbia, or the bonds of any county or municipal corporation of this or any other state of the United States or the District of Columbia in an amount equal to the total amounts of all outstanding and unpaid compensation awards against such surety. In lieu of such money or bonds the commission may allow or require such surety to file or maintain with the treasurer of the state a surety bond of some company or companies authorized to do business in this state for and in the amounts equaling the total unpaid compensation awards against such surety. The approval by the commission of any surety or self-insured employer may be withdrawn if it shall appear to the commission that workmen secured thereby under this law are not fully protected. [I.C., § 72-301, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 208, § 2, p. 1538.]

### STATUTORY NOTES

**Cross References.** — Effect of failure to procure security, § 72-319.

Insurance companies generally, title 41, Idaho Code.

Penalty for failure to procure security, § 72-319.

Posting of notice of security, § 72-312.

State insurance fund, § 72-901 et seq.

Surety insurance contracts, §§ 41-2603 — 41-2612.

Withdrawal from state fund, § 72-920.

**Compiler's Notes.** — The words "this law" and "this act" refer to S.L. 1971, ch. 124, as amended compiled as §§ 72-101 — 72-805.

The name of the commissioner of insurance has been changed to the director of the department of insurance by the Code Commission on the authority of S. L. 1974, ch. 286, § 1 and S. L. 1974, ch. 11, § 3 (§ 41-203).

### JUDICIAL DECISIONS

#### ANALYSIS

Construction.

Denial of application.

Failure to secure payment of compensation.

Interpretation.

Public employers.

Subcontractors.

**Construction.**

Giving the words of this section their plain, obvious, and rational meanings, the legislature intended that every employer, whether public or private, may either purchase worker's compensation insurance or self-insure. *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997).

Subsection (2) can be complied with without violating the provisions of § 72-912, and these two sections can be construed in harmony. *Edwards v. Industrial Comm'n*, 130 Idaho 457, 943 P.2d 47 (1997).

Worker was the direct employee of the contractor, which in turn contracted with the respondents, and at the time of his injury, the worker was doing the work his employer had contracted to do; thus, the respondents would not have been permitted to escape liability to the worker if the employer had not complied with § 72-301; hence, they were employers as contemplated in § 72-216. *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

**Denial of Application.**

Denial of city's application for self-insurance was supported by substantial and competent evidence where commission found that city seemed to contemplate limiting its liability and intended to purchase excess insurance to cover any additional liability, that city had no definite plan to provide excess insurance and thus did not meet the statutory requirement that "payment of compensation be sure and certain" and that city's plan was not sufficient to meet requirements for self-insurance. *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997).

**Failure to Secure Payment of Compensation.**

By virtue of § 72-210, claimant was entitled to attorney fees in defendant's appeal of a worker's compensation award since defendant failed to secure payment of compensation as required under this section. *Swenson v. Estate of Craner*, 117 Idaho 57, 785 P.2d 621 (1990).

**Interpretation.**

The plaintiff's request that the commission issue a declaratory ruling interpreting this section and § 72-912 which would have required the commission itself to take certain action raised serious due process questions, and a petition for writ of mandamus was the proper course of action for the plaintiff to take under the circumstances in this case. *Edwards v. Industrial Comm'n*, 130 Idaho 457, 943 P.2d 47 (1997).

**Public Employers.**

The language of this section is clear and unambiguous that public employers are per-

mitted to self-insure for worker's compensation. *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997).

Commission's ruling denying city's application for self-insurance was not premature and was supported by substantial evidence where resolution passed by the city seemed to contemplate limiting the city's liability to \$500,000 per occurrence and commission had never authorized self-insurance with limited liability and such limitation is not permitted by rule, regulation or statute, where city had no plan to provide excess insurance and this meant the statutory requirement that payment of compensation be sure and certain was not met, where city had little experience with workers' compensation to give it the required expertise in workers' compensation, and where city was given every opportunity to support its position through its application and various other materials provided to the Commission. *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997).

The phrase "provided, that every public employer shall insure its liability for payment of compensation with the state insurance fund unless such fund shall refuse to accept that risk when the application for insurance is made" is contained entirely within subsection (1) of this section and applies only to such subsection; thus if a public employer chooses to obtain an insurance policy, the employer must first apply to SIF for the policy and if SIF refuses to accept the risk then the public employer may seek out other sources for the policy; however, a public employer, like a private employer, may provide security for worker's compensation through self-insurance under the provisions of subsection (2) of this section and it need not attempt to first obtain a policy from SIF. *City of Boise v. Industrial Comm'n*, 129 Idaho 906, 935 P.2d 169 (1997).

**Subcontractors.**

Employer food service supplier was immune to liability for injuries received by an employee of its subcontractor, because the subcontractor had properly provided workers' compensation coverage for its employees. *Gonzalez v. Lamb Weston, Inc.*, — Idaho —, 124 P.3d 996 (2005).

**Cited in:** *Shea v. Bader*, 102 Idaho 697, 638 P.2d 894 (1981); *Vig v. Erickson*, 89 Bankr. 850 (Bankr. D. Idaho 1988); *Peone v. Regulus Stud Mills, Inc.*, 858 F.2d 550 (9th Cir. 1988); *State ex rel. Industrial Comm'n v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000); *Stoica v. Pocol*, 136 Idaho 661, 39 P.3d 601 (2001); *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003).



## DECISIONS UNDER PRIOR LAW

**Liability of State Insurance Fund.**

The state insurance fund was liable for injuries sustained prior to the expiration of its coverage notwithstanding an application for insurance in an insurance company had been made which recited that it was to be effective as of the date of "this application" but which did not actually become effective until the expiration of the coverage of the state insurance fund. *Holt v. Spencer Lumber Co.*, 68 Idaho 478, 199 P.2d 268 (1948).

An injured employee of an uninsured con-

tractor was not entitled to recover compensation from the insured materialman on the ground that the materialman and his surety constituted the "industry," and that the compensation act created an entity out of the industry and charged thereto all losses sustained by an injured workman, since the act did not contemplate payment to an injured workman by the state insurance fund unless his employer was insured therewith. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

## OPINIONS OF ATTORNEY GENERAL

The status of an employer as a partnership with a non-Indian partner or a corporation with non-Indian shareholders, officers or directors does not change the conclusion that the employer is subject to state workers' compensation laws; therefore, the Idaho Industrial Commission has the authority to enforce the requirements of this section against such employers. OAG 88-5.

The Idaho Industrial Commission has the authority to enforce the requirements of this section against Indian employers doing business within a reservation; however, the doctrine of sovereign immunity precludes the Idaho Industrial Commission from bringing an action against a tribal government or a tribally-owned business. OAG 88-5.

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 470 et seq.

**C.J.S.** — 100 C.J.S., Workers' Compensation, § 639 et seq.

**A.L.R.** — Liability of insurance broker or agent to insured for failure to procure insurance. 64 A.L.R.3d 398.

Liability of insurance agent or broker on ground of inadequacy of liability insurance

coverage procured. 72 A.L.R.3d 704.

Liability of insurance agent or broker on ground of inadequacy of life, health, and accident insurance coverage procured. 72 A.L.R.3d 735.

Liability of insurance agent or broker on ground of inadequacy of property insurance coverage procured. 72 A.L.R.3d 747.

**72-302. Regulation of deposit with state treasurer.** — The securities so deposited with the state treasurer shall be an exclusive trust for the benefit of the employees of the employers whose compensation liability is so secured, to remain with the treasurer in trust to answer any default of any employer, self-insured employer or surety upon any such obligation established by final judgment upon which execution may lawfully be issued against the employer or surety; the surety, however, at all times shall have the right to collect the interest, dividends and profits upon the securities, and from time to time to withdraw the securities or a portion thereof, substituting therefor others of equally good character and value, to the satisfaction of the commission, and the securities shall not be sold under any process against the surety until after thirty (30) days' notice to the surety, supplying the date, place and manner of sale, and the process under which and the purpose for which the sale is to be made, accompanied by a copy of the process. The surety shall not be permitted to withdraw from the state treasurer the deposits of money or bonds or permit the surety bonds to lapse for a period of one (1) year after discontinuing business within this state, or while any suit is pending or while any judgment against the surety in this



state, or award against an employer whose compensation liability is secured by the surety, shall remain unpaid. Securities which are used to satisfy the requirements of this chapter may be held in the federal reserve book-entry system, as defined in section 41-2870(4), Idaho Code, and interests in such securities may be transferred by bookkeeping entry in the federal reserve book-entry system without physical delivery of certificates representing such securities. [I.C., § 72-302, as added by 1971, ch. 124, § 3, p. 422; am. 1986, ch. 247, § 2, p. 666.]

### JUDICIAL DECISIONS

#### **Attorney's Fees and Penalty.**

Where the record in a workmen's compensation proceeding indicated that an employer neither had workmen's compensation insurance at the time of claimant's industrial acci-

dent nor had deposited sufficient security with the commission, the commission did not err in awarding a penalty and attorney's fee. *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

**72-303. Qualification subject to regulation.** — To the end that payment of compensation secured by this law shall be adequately protected, the commissioner of insurance is hereby authorized and empowered to make and change from time to time such reasonable regulations as he may deem necessary with reference to required capital stock, surplus and reserves of sureties securing payment of compensation under this law. [I.C., § 72-303, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-304. Prompt compensation payments required — Rules and regulations.** — The commission is authorized to make and change from time to time such rules and regulations as it shall deem necessary to secure the prompt payment of compensation, and after affording the surety opportunity to be heard, may withdraw its approval of any employer or surety who unnecessarily delays payment of compensation, and the commissioner of insurance upon notification accordingly shall withdraw his authorization of a surety to insure or guarantee the payment of workmen's compensation liability of employers in this state. [I.C., § 72-304, as added by 1971, ch. 124, § 3, p. 422.]

**72-305. Claims services and medical supervision.** — Each surety shall provide prompt claims services through its own adjusting offices or officers located within the state, or by independent, licensed, resident adjusters.

The surety shall provide medical supervision of cases from its insureds through medical consultants located within the state or near enough to provide prompt and continuous service. [I.C., § 72-305, as added by 1971, ch. 124, § 3, p. 422.]

**72-306. Recitals in insurance contracts.** — Every policy of insurance and every guaranty contract or surety bond covering the liability of the employer for compensation shall cover the entire compensation liability of the employer to his employees, and shall contain a provision setting forth the right of an employee to enforce in his own name, either by at any time filing a separate claim or by at any time making the surety a party to the original claim, the liability of the surety in whole or in part for the payment of such compensation, provided, that payment in whole or in part of such compensation by either the employer or the surety shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid. [I.C., § 72-306, as added by 1971, ch. 124, § 3, p. 422.]

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Filing and service of claim.  
Liability of surety.

#### Filing and Service of Claim.

The requirement, with respect to the filing and service of claim of accident, was the same with respect to the insurance carrier of employee. *Moody v. State Hwy. Dep't*, 56 Idaho 21, 48 P.2d 1108 (1935).

Under the Workmen's Compensation Law, the duties and liabilities of a surety were prescribed by statute, and the statutory provision became a part of the contract, whether given by surety company or state insurance fund, and the injured workman or legal representatives were authorized to prosecute a separate or independent claim against a

surety. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

#### Liability of Surety.

Surety's assumption of liability was contractual. *Stinger v. Dickens Consol. Mines Co.*, 44 Idaho 558, 258 P. 1117 (1927).

Liability was upon both the employer and his surety and where claims were made against two employers engaged in a joint venture, it was error to dismiss their sureties from the proceeding. *Clawson v. General Ins. Co.*, 90 Idaho 424, 412 P.2d 597 (1966).

**72-306A. Deductible contract.** — (1) A surety issuing a worker's compensation insurance contract may offer deductibles optional to the policyholder for benefits payable thereunder so long as the director of the department of insurance approves the contract.

(2) The director of the department of insurance shall approve a contract containing such a deductible if, but only if, he finds the following standards have been met:

- (a) Claimants' rights are properly protected and claimants' benefits are paid without regard to any such deductible;
- (b) Premium reductions reflect the type and level of the deductible, consistent with accepted actuarial standards;
- (c) Premium reductions for deductibles are determined before application of any experience modification, premium surcharge or premium discount;
- (d) Recognition is given to policyholder characteristics, including size, financial capabilities, nature of activities and number of employees;
- (e) The policyholder is liable to the surety for the deductible amount in regard to benefits paid for compensable claims;

(f) The surety pays all of the deductible amount, applicable to a compensable claim, to the person or provider entitled to benefits and then seeks reimbursement from the policyholder for the applicable deductible amount;

(g) Failure to reimburse deductible amounts by the policyholder to the surety is treated under the policy in the same manner as nonpayment of premiums; and

(h) Losses subject to the deductible shall be reported and recorded as losses for purposes of ratemaking and application of the experience rating plan on the same basis as losses under policies providing first dollar coverage; and

(i) The contract otherwise complies with the statutes of this state.

(3) The premium tax required to be paid pursuant to section 72-523, Idaho Code, shall be calculated based on premiums which would have been charged but for the deductible. For all other taxes and assessments, including residual market assessments, based on premium, the amount of premium shall be determined after application of the deductible. [I.C., § 72-306A, as added by 1993, ch. 223, § 1, p. 759.]

**72-307. Knowledge of employer to affect surety.** — Every such policy, contract or bond shall contain a provision that, as between the employee and the surety, the notice to or knowledge of the occurrence of accident causing an injury or manifestation of an occupational disease on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the surety, that the jurisdiction of the employer shall, for the purpose of this law, be the jurisdiction of the surety, and that the surety shall in all things be bound by and subject to the orders, findings, decisions, or awards of the commission rendered against the employer for the payment of compensation. [I.C., § 72-307, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

#### JUDICIAL DECISIONS

**Cited in:** Nelson v. Pumnea, 106 Idaho 48, 675 P.2d 27 (1983).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Aggravation of preexisting infirmity.

Construction.

Contribution.

Parties to claims.

Provision read into contracts.

Notice.



**Aggravation of Preexisting Infirmary.**

When an industrial accident aggravated a preexisting infirmity, the employer was liable for that portion of the disability and medical expense causally connected to the accident itself. *Clark v. Sage*, 95 Idaho 79, 502 P.2d 323 (1972).

**Construction.**

These statutory provisions had to be read into all contracts of insurance. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

**Contribution.**

Insurer, who was paid premiums due under policy, and who paid losses under the policy was not entitled to contribution from another insurer whose policy was written by mistake, and who never received any premiums on same. *Musgrave v. Liberty Mut. Ins. Co.*, 73 Idaho 261, 250 P.2d 909 (1952).

**Parties to Claims.**

Claim against insurance company was not barred because company was not made party to original proceedings against employer before industrial accident board. *Hauter v.*

*Coeur d'Alene Antimony Mining Co.*, 39 Idaho 621, 228 P. 259 (1924).

**Provision Read into Contracts.**

The statutory provision that "the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be on the part of the surety," was included among those provisions which had to be read into all contracts of workmen's compensation insurance. "Employer" included his surety so far as applicable. *Larson v. State*, 79 Idaho 446, 320 P.2d 763 (1958).

**Notice.**

Notice to employer was notice to surety. *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

Since notice to the employer was notice to the surety, where employer's shop foreman was with claimant at the time of the accident and reported the accident directly to the employer and another employee prepared the notice and claim for compensation about six weeks later, both employer and surety had sufficient notice of claimant's accident and injury. *Facer v. E.R. Steed Equip. Co.*, 95 Idaho 608, 514 P.2d 841 (1973).

**72-308. Insolvency of employer not to release surety.** — Every such policy, contract or bond shall contain a provision to the effect that the insolvency or bankruptcy of the employer and his discharge therein shall not relieve the surety from the payment of compensation for injuries received or occupational diseases contracted or death sustained by an employee during the life of such policy or contract. [I.C., § 72-308, as added by 1971, ch. 124, § 3, p. 422.]

**72-309. Insurance contract deemed reformed.** — Every such policy, contract or bond shall be deemed to be made subject to the provisions of this law and, if inconsistent with this law, shall be deemed to be reformed to conform to the provisions of this law. [I.C., § 72-309, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-310. Misrepresentation not to affect employee's rights.** — (1) No statement in an application for such a policy, contract or bond shall void the policy, contract or bond as between the surety and employer unless such statement shall be false and would materially have affected the acceptance of the risk if known by the surety. In no case shall the holding of the policy, contract or bond void between the surety and employer affect the surety's obligation to the employer's employees or their dependents to pay compensation and to discharge other obligations under this law. In such

case, the surety shall have a right of action against the employer for any amounts for which the surety is liable under such policy, contract or bond.

(2) As between any such employee or his dependents and the surety no question as to breach of warranty or misrepresentation by the insured shall be raised by the surety in any proceeding or any appeal therefrom. [I.C., § 72-310, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

#### **72-311. Notice of security — Cancellation of surety contract. —**

(1) The employer shall forthwith file with the commission in form prescribed by it, a notice of his security.

(2) No policy of insurance or guaranty contract or surety bond issued against liability arising under this act, where the policy, contract, or bond is intended to provide coverage of greater than one hundred eighty (180) days, shall be canceled or not renewed until at least sixty (60) days after notice of cancellation has been filed with the industrial commission, and also served on the other contracting party either personally or by certified mail to the last known address of the other contracting party. If cancellation is due to failure to pay premiums, material misrepresentations by the insured, substantial and unforeseen changes in the risk assumed, substantial breaches of contractual duties, conditions or warranties, or the policy is being canceled or not renewed at the request of the policyholder, then at least ten (10) days' notice of cancellation is required and the notice shall be filed as required in this section. For purposes of this section, service by certified mail is complete either on acknowledgement of receipt or refusal of the notice by the contracting party or the fifteenth day after the date the postal authority first attempts to deliver the certified mail as evidenced by P.S. form 3849 or other similar document.

(3) A contracting party may, by its own representations or actions, be estopped by the commission from relying on the time limitations set out herein. [I.C., § 72-311, as added by 1971, ch. 124, § 3, p. 422; am. 1972, ch. 185, § 1, p. 472; am. 1987, ch. 278, § 16, p. 571; am. 1988, ch. 238, § 1, p. 466; am. 1994, ch. 178, § 1, p. 417; am. 2006, ch. 16, § 29, p. 42.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 16, substituted "canceled" for "cancelled" twice in subsection (2).

**Compiler's Notes.** — The words "this act" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

Section 19 of S.L. 1987, ch. 278 read: "The provisions of this act are hereby declared to be severable and if any provision of this act or the application of such provision to any person or circumstance is declared invalid for

any reason, such declaration shall not affect the validity of remaining portions of this act."

**Effective Dates.** — Section 2 of S.L. 1972, ch. 185, declared an emergency. Approved March 21, 1972.

Section 18 of S.L. 1987, ch. 278 read: "The provisions of this act shall take effect on July 1, 1987, provided however, that Section [Sections] 1 through 11 shall apply only to causes of action which accrue on and after July 1, 1987. Provided further, that Section 6-1603,



Idaho Code, as enacted herein, is hereby repealed and does sunset for causes of action which accrue after June 30, 1992."

## JUDICIAL DECISIONS

### ANALYSIS

Cancellation notice.

Failure to file.

Jurisdiction of industrial commission.

Strict compliance.

### Cancellation Notice.

Where an Oregon employer's worker's compensation insurance policy contained an amendatory endorsement which indicated that it covered employer's operations in certain enumerated states, one of which was Idaho, the policy remained in effect in Idaho even though insurance company had canceled the policy in accordance with Oregon cancellation requirements; insurance company failed to comply with Idaho's sixty-day notice of cancellation requirement. *Smith v. O/P Transp.*, 128 Idaho 697, 918 P.2d 281 (1996).

### Failure to File.

The Industrial Commission's finding that an employer had failed to file its notice of security as required by this section was sufficient to justify the imposition of penalties required by § 72-210, without having to resolve the ultimate issue of coverage between the employer and its insurer. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

### Jurisdiction of Industrial Commission.

Questions arising under subsection (2) of this section and § 72-313 are within the subject matter jurisdiction of the Industrial Commission. *Smith v. O/P Transp., Inc.*, 120 Idaho 123, 814 P.2d 23 (1991).

### Strict Compliance.

Viewing § 72-210, subsection (1) of this section and § 72-312 in pari materia, it is apparent that the legislature intended strict compliance with those provisions requiring the employer to obtain security for payment of compensation to injured employees and that it intended substantial penalties for noncompliance; accordingly, an employer's good faith but futile attempt to procure insurance did not excuse it from liability for the ten percent surcharge, costs or attorney fees imposed by § 72-210. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Cancellation.

Notice.

Survival of claims to workman's estate.

### Cancellation.

In view of fact that contracts of insurance were issued not only for benefit of employer but also for employee, who necessarily had no control over them, any attempted cancellation should have been in strict compliance with terms of contract itself. *Hauter v. Coeur d'Alene Antimony Mining Co.*, 39 Idaho 621, 228 P. 259 (1924).

State insurance fund had a right to cancel policy, by compliance with the law and policy provisions. *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939).

Strict compliance regarding cancellation of compensation insurance policies had long been practiced in this state and was enjoined by statute. *Cowles v. State Ins. Fund*, 67 Idaho 165, 173 P.2d 722 (1946); *Passmore v. Austin*, 73 Idaho 484, 253 P.2d 800 (1953).

Failure of fund to notify employer of

cancellation and to refund unearned premiums resulted in liability of fund for compensation for employee who was killed in course of employment. *Cowles v. State Ins. Fund*, 67 Idaho 165, 173 P.2d 722 (1946).

### Notice.

Statutory requirement for 10 days' notice in proceeding by insurer to cancel coverage was for the benefit of employer and injured worker and did not apply to contribution suit between insurers. *Musgrave v. Liberty Mut. Ins. Co.*, 73 Idaho 261, 250 P.2d 909 (1952).

Compensation policy was not canceled where notice of cancellation was sent to insured by ordinary mail where policy in addition to provisions of the statute required service of notice, either by personal service or by registered mail. *Passmore v. Austin*, 73 Idaho 484, 253 P.2d 800 (1953).



**Survival of Claims to Workman's Estate.**

Although claims for specific indemnities for permanent injuries survived the death of the workman, where the injuries were multiple and combined constituted total permanent

disability, claims for specific indemnities could not survive to the workman's estate. *Martin Estate v. Woods*, 94 Idaho 870, 499 P.2d 569 (1972).

**72-312. Posting of notice regarding insurance — Penalty.** — Every employer who has complied with section 72-301 shall post and maintain in a conspicuous place or places in and about his place or places of business typewritten or printed notices in form prescribed by the commission, stating the fact that he has complied with the law as to securing the payment of compensation to his employees and their dependents in accordance with the provisions of this law. Such notice shall contain the name and address of the surety, if any, with which the employer has secured payment of compensation. An employer who fails to post and keep such notice conspicuously displayed shall be guilty of a misdemeanor. [I.C., § 72-312, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**JUDICIAL DECISIONS****Strict Compliance.**

Viewing § 72-210, subsection (1) of § 72-311 and this section in *pari materia*, it is apparent that the legislature intended strict compliance with those provisions requiring the employer to obtain security for payment of compensation to injured employees and that

it intended substantial penalties for noncompliance; accordingly, an employer's good faith but futile attempt to procure insurance did not excuse it from liability for the ten percent surcharge, costs or attorney fees imposed by § 72-210. *Heese v. A & T Trucking*, 102 Idaho 598, 635 P.2d 962 (1981).

**DECISIONS UNDER PRIOR LAW****Provisions Mandatory.**

The provisions of the statute requiring employer to post notice of coverage were manda-

tory. *Modlin v. Twin Falls Canal Co.*, 49 Idaho 199, 286 P. 612 (1930).

**72-313. Payment pending determination of policy coverage.** — Whenever any claim is presented and the claimant's right to compensation is not in issue, but the issue of liability is raised as between an employer and a surety or between two (2) or more employers or sureties, the commission shall order payment of compensation to be made immediately by one or more of such employers or sureties. The commission may order any such employer or surety to deposit the amount of the award or to give such security thereof as may be deemed satisfactory. When the issue is finally resolved, an employer or surety held not liable shall be reimbursed for any such payments by the employer or surety held liable and any deposit or security so made shall be returned. [I.C., § 72-313, as added by 1971, ch. 124, § 3, p. 422.]

## JUDICIAL DECISIONS

## ANALYSIS

Jurisdiction of industrial commission.  
Legislative intent.

**Jurisdiction of Industrial Commission.**

Questions arising under subsection (2) of § 72-311 and this section are within the subject matter jurisdiction of the Industrial Commission. *Smith v. O/P Transp., Inc.*, 120 Idaho 123, 814 P.2d 23 (1991).

**Legislative Intent.**

The legislative purpose behind this section is to ensure that injured claimants receive

immediate compensation whenever the employers or sureties involved contest liability between them. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

**Cited in:** *Hite v. Kulhenak Bldg. Contractor*, 96 Idaho 70, 524 P.2d 531 (1974); *Loughmiller v. Interstate Farmlines*, 107 Idaho 179, 687 P.2d 569 (1984).

## DECISIONS UNDER PRIOR LAW

**Survival of Claims to Workman's Estate.**

Although claims for specific indemnities for permanent injuries survived the death of the workman, where the injuries were multiple and combined constituted total permanent disability, claims for specific indemnities could not survive to the workman's estate.

*Martin Estate v. Woods*, 94 Idaho 870, 499 P.2d 569 (1972).

The obligation of an employer and surety to pay for the total and permanent disability of a workman terminated on the death of the workman. *Martin Estate v. Woods*, 94 Idaho 870, 499 P.2d 569 (1972).

**72-314. Payment of liability of public employer.** — Any sums necessary to be paid under the provisions of this law by any public or quasi-public employer, which exercises taxing power, for compensation premiums or compensation shall be considered to be ordinary and necessary expenses of such employer, and its governing body shall make appropriation of and pay such sums whenever necessary, notwithstanding that it may have failed to anticipate such ordinary and necessary expense in any budget, estimate of expense, appropriation, ordinance, or otherwise. [I.C., § 72-314, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-315. Erroneous payment in good faith.** — Payment of death benefits by an employer in good faith to a dependent subsequent in right to another or other dependents shall protect and discharge the employer unless and until such dependent or dependents prior in right shall have given him notice of his or their claim. [I.C., § 72-315, as added by 1971, ch. 124, § 3, p. 422.]

**72-316. Voluntary payments of income benefits.** — Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the

amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid, and not by reducing the amount of the weekly payments. [I.C., § 72-316, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Voluntary payment refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.  
obviates necessity of filing claim, § 72-701.

**Compiler's Notes.** — The words "this law"

### JUDICIAL DECISIONS

**Cited in:** Swenson v. Estate of Craner, 117 Idaho 57, 785 P.2d 621 (1990).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Excess payments.  
Unauthorized payments to guardian.

#### **Excess Payments.**

Where excess payments had been made under the compensation law, the rights of the parties with respect to the sums paid in excess of those provided for by law were governed by the statute. *McRae v. School Dist.* No. 23, 56 Idaho 384, 55 P.2d 724 (1936).

with statutory requirements necessary to delivery of ward's estate was incompetent to make agreements for payments by surety company of compensation due his ward, even though such agreements were approved by industrial board; however, surety was entitled to credit for any sums actually used for the benefit of ward. *In re Bones*, 48 Idaho 85, 280 P. 223 (1929).

#### **Unauthorized Payments to Guardian.**

Foreign guardian who had not complied

**72-317. Periodical payments.** — The commission, upon the application of either party, may in its discretion, having regard to the welfare of the employee and the convenience of the employer, authorize income benefits to be paid biweekly or monthly instead of weekly. [I.C., § 72-317, as added by 1971, ch. 124, § 3, p. 422.]

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### **Purpose.**

Purpose of periodical payments was to preclude any possibility of imprudent employee or dependent wasting means provided for his

support and thereby becoming burden on society. *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927).

**72-318. Invalid agreements — Penalty.** — (1) No agreement by an employee to pay any portion of the premiums paid by his employer for workmen's compensation, or to contribute to the cost or other security maintained for or carried for the purpose of securing the payment of workmen's compensation, or to contribute to a benefit fund or department maintained by the employer, or any contract, rule, regulation or device



whatever designed to relieve the employer in whole or in part from any liability created by this law, shall be valid. Any employer who makes a deduction for such purpose from the remuneration of any employee entitled to the benefits of this act shall be guilty of a misdemeanor.

(2) No agreement by an employee to waive his rights to compensation under this act shall be valid. [I.C., § 72-318, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" and "this act" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### ANALYSIS

Burden of proof.  
Effect of agreement.  
Independent contractor.  
Reduction of benefits.

### **Burden of Proof.**

The burden was upon the claimant to establish that the contract between him and his alleged employer was a device to relieve the alleged employer from liability under the Workman's Compensation Law. *Smith v. Sindt*, 89 Idaho 409, 405 P.2d 959 (1965).

### **Effect of Agreement.**

Where other factors indicate the existence of a right to control and an employee-employer relationship, the court will refuse to be bound by an agreement between the parties as to the nature of their relationship; no such agreement can constitute a waiver by an employee of any rights he might otherwise have under the workmen's compensation law. *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985).

Stipulation made as part of a motion to dismiss a worker's compensation action did not constitute an invalid agreement under subsection (2) of this section. *Emery v. J.R.*

*Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005).

### **Independent Contractor.**

Where the only evidence suggesting an independent contractor relationship was that one of the owners told worker that he would be an independent contractor, to which worker agreed, any such agreement whereby worker would be called an independent contractor, without him actually being one, was void for public policy. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

### **Reduction of Benefits.**

This section does not prohibit a reduction of disability retirement benefits. It only prohibits an agreement by an employee to relieve an employer of an obligation that the employer has because of the workers' compensation laws. *Osick v. Public Employee Retirement Sys.*, 122 Idaho 457, 835 P.2d 1268 (1992).

**Cited in:** *Lee v. Sun Valley Co.*, 107 Idaho 976, 695 P.2d 361 (1984).

**72-319. Penalty for failure to secure compensation.** — (1) Any employer required to secure the payment of compensation under this law who fails to secure the payment thereof shall be guilty of a misdemeanor. In any case where the employer is a corporation or a limited liability company, any officer or employee of the corporation or manager or employee of a limited liability company who had authority to secure payment of compensation on behalf of the corporation or limited liability company and failed to do so shall individually be guilty of a misdemeanor.

(2) Such officer, employee or manager shall be personally liable jointly and severally with such corporation or limited liability company for any compensation which may accrue under this law in respect to any injury or

occupational disease suffered by any employee of such corporation or limited liability company while it shall so fail to secure the payment of compensation.

(3) Any employer who knowingly transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secretes or destroys any property or records belonging to such employer, after one (1) of its employees has been afflicted by an injury or occupational disease, with intent to avoid the payment of compensation to such employee or his dependents, shall be guilty of a misdemeanor. In any case where such employer is a corporation or limited liability company, any officer, employee or manager thereof, if knowingly participating or acquiescing in any such act, shall also be individually guilty of a misdemeanor.

(4) Any employer required to secure the payment of compensation under this law, who fails to do so, may be liable for a penalty of either two dollars (\$2.00) for each employee for each day or twenty-five dollars (\$25.00) for each day during which such failure continues, whichever is greater, and in cases where the employer is a corporation or limited liability company and is unable to pay the fine, any officer or employee of the corporation or manager of a limited liability company who had authority to secure payment of compensation on behalf of the corporation or a limited liability company and failed to do so, shall be liable for a like penalty, to be recovered for the time during which such failure continued, but for not more than three (3) consecutive years, in an action brought by the commission in the name of the state of Idaho; any amount so collected shall be paid into the industrial administration fund; for this purpose the district court of any county in which the employer carries on any part of its trade or occupation shall have jurisdiction. In determining whether penalties should be assessed or collected for the employer's failure to secure the payment of compensation, the commission may consider the following factors:

- (a) When the employer was notified that such employer's worker's compensation insurance coverage had been cancelled or that such insurance was required;
- (b) The length of time that elapsed between when the employer was notified that worker's compensation insurance coverage was required or that such employer's coverage had been cancelled, and the date that such coverage was put into effect;
- (c) Whether the employer is able to document attempts to secure worker's compensation insurance coverage during the period of time that such employer was without such coverage;
- (d) Whether there were prior instances in which the employer failed to keep worker's compensation insurance in effect or such coverage was cancelled, and the reasons for such failure or cancellation;
- (e) The reasons that the employer is unable to obtain or keep in effect worker's compensation insurance coverage;

The above factors are not exclusive and the commission may consider any other relevant factor.

(5) If any employer required to secure the payment of compensation under this law is or has been in default under section 72-301, Idaho Code,



the employer may be enjoined by the district court of any county in which such employer carries on any part of its trade or occupation from carrying on such business while any default under section 72-301, Idaho Code, exists. All proceedings in the courts under this section are to be brought by the industrial commission in the name of the state of Idaho.

(6) An employer who fails to secure the payment of compensation and who has been assessed a penalty within the previous three (3) years pursuant to section 72-319(4), Idaho Code, shall be liable for the following penalty in addition to the penalty provided by section 72-319(4), Idaho Code:

(a) Five hundred dollars (\$500) for the second failure to secure the payment of compensation;

(b) One thousand dollars (\$1,000) for the third and any subsequent failure to secure the payment of compensation. [I.C., § 72-319, as added by 1971, ch. 124, § 3, p. 422; am. 1973, ch. 112, § 1, p. 203; am. 1988, ch. 239, § 1, p. 467; am. 1990, ch. 322, § 1, p. 880; am. 1992, ch. 308, § 1, p. 919; am. 1997, ch. 304, § 1, p. 906.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### ANALYSIS

Application.

Construction with other laws.

Procedure.

#### Application.

Pursuant to 40 U.S.C. § 290, which extended the authority of states to apply workers' compensation laws to lands owned or held by the United States, Idaho's workers' compensation laws apply on land "owned or held by the United States of America by deed or act of cession, by purchase or otherwise," and the right which Indians held in reservation land is that of occupancy, the fee and right of disposition remains in the United States government. As such, Idaho's workers' compensation laws apply on the reservation and the state courts have the subject matter jurisdiction to enforce such laws against an Indian tribe member operating a business on an Indian reservation. *State ex rel. Indus. Comm'n v. Indian Country Enters., Inc.*, 130 Idaho 520, 944 P.2d 117 (1997).

#### Construction with Other Laws.

This section fits within the "except as otherwise herein provided" language of § 72-707

by granting the district court jurisdiction over an action to recover statutory penalties. *State ex rel. Industrial Comm'n v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000).

#### Procedure.

The industrial commission followed the procedure set forth unambiguously in the statute when, in its executive agency capacity, determined penalties should be assessed against employer for violating the requirements of § 72-301 and forwarded the case to the attorney general's office; the attorney general then filed an action in district court to collect the statutory penalties against employer. *State ex rel. Industrial Comm'n v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000).

**Cited in:** *State ex rel. Indus. Comm'n v. Bible Missionary Church, Inc.*, 138 Idaho 847, 70 P.3d 685 (2003).

**72-320. Compensation preferred as wages.** — All rights of compensation granted by this law shall have the same preference or priority for the



whole thereof against the assets of the employer as is allowed by law for any unpaid wages of labor. [I.C., § 72-320, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — Wages as preferred refer to S.L. 1971, ch. 124, compiled as §§ 72-claims, § 45-601 et seq. 101 — 72-805.

**Compiler's Notes.** — The words "this law"

**72-321. Statutory agent of employer who has no business locale.** — If an employer maintains no place of business in this state, he shall be deemed to have appointed the secretary of state as his agent for the purpose of acceptance of service of process, or of any order, directive, decision or award of the commission or of notice of any proceeding commenced by any party pursuant to this law. [I.C., § 72-321, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-322. Assigned risk.** — The director of the department of insurance, after consultation with sureties authorized to issue worker's compensation policies and guaranty contracts in this state, may put into effect a reasonable system for the equitable apportionment among such sureties of applicants for such policies or guaranty contracts who are in good faith entitled to but are unable to procure the same through ordinary methods. Such system shall be so drawn as to guarantee that such an applicant, if not in default on worker's compensation premiums, shall, following his application to the assigned risk system and tender of required premium, be covered by worker's compensation insurance or his coverage guaranteed. When any such system has been approved, all such carriers shall subscribe thereto and participate therein. Assignment shall be in such manner that, as far as practicable, no surety shall be assigned a larger proportion of compensation premiums under assigned policies during any calendar year than that which the total of compensation premiums written in the state by such surety during the preceding year bears to the total compensation premiums written in the state by all such sureties during the preceding calendar year. Provided however, that domestic reciprocal insurers which insure only worker's compensation risks shall be exempt from participation in this system. Premium charges for the assigned risk plan shall not be excessive, inadequate, nor unfairly discriminatory and shall produce sufficient revenue to make the plan self-sustaining and self-supporting. [I.C., § 72-322, as added by 1971, ch. 124, § 3, p. 422; am. 1996, ch. 220, § 2, p. 774; am. 1996, ch. 305, § 4, p. 1000.]

## STATUTORY NOTES

**Amendments.** — This section was amended by two 1996 acts — ch. 220, § 2, and ch. 305, § 4, both effective July 1, 1996 — which appear to be compatible and have been compiled together. Whereas both acts added a fifth sentence, the sentence added by ch. 305, § 4, has been compiled as the present sixth sentence.

The 1996 amendment, by ch. 220, § 2, in the first sentence substituted “director of the department of insurance” for “commissioner of insurance”; in the first and second sentences substituted “worker’s compensation” for “workmen’s compensation” in each occurrence; and added the present fifth sentence.

The 1996 amendment, by ch. 305, § 4, in the first sentence substituted “director of the department of insurance” for “commissioner

of insurance”; in the first and second sentences substituted “worker’s compensation” for “workmen’s compensation” in each occurrence; and added the present sixth sentence.

**Legislative Intent.** — Section 1 of S.L. 1996, ch. 220 read: “LEGISLATIVE INTENT. It is the intent of the legislature that, through this act, domestic reciprocal insurers which offer only worker’s compensation coverage be treated like self-insured employers. Commercial insurance companies are required to participate in the assigned risk pool. However, it is the intent of the legislature that small, domestic reciprocal insurers addressed through this act not be included in the assigned risk pool and not be required to participate in the assigned risk pool system.”

## JUDICIAL DECISIONS

## ANALYSIS

Open claim for previous injury.

Preexisting injury and apportionment.

Stability of injury and apportionment.

**Open Claim for Previous Injury.**

An impairment, the claim for benefits on which is an open, unresolved, and viable claim at the time of a subsequent injury, and which had not reached medical stability at the time of the subsequent injury, does not constitute a preexisting injury under the worker’s compensation statutes. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

**Preexisting Injury and Apportionment.**

Where claimant’s consolidated claims encompassed two independent work-related injuries caused by two separate accidents at different places of employment, and two non-work-related conditions for which compensation was sought, the industrial commission

erred in apportioning liability based upon the impact of an injury which was not “preexisting” within the meaning of § 72-332. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

**Stability of Injury and Apportionment.**

Stability is a key factor to consider when determining if a preexisting impairment exists: Where a claimant’s previous injury becomes medically stable before he suffers the next injury, the industrial commission can correctly conclude that the first injury was a preexisting impairment; claims may need to be resolved individually to a certain extent before liability as a whole can be apportioned under this section. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

**72-323. Creation of industrial special indemnity fund.** — A fund is hereby created to be known as the industrial special indemnity fund, which shall consist of payments made to it as in sections 72-327 and 72-420, and as may hereafter be provided. [I.C., § 72-323, as added by 1971, ch. 124, § 3, p. 422.]

## JUDICIAL DECISIONS

**Cited in:** *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).



## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Aggravation of preexisting infirmity.  
Construction.  
Liability of fund.  
Purpose of fund.

**Aggravation of Preexisting Infirmity.**

When an industrial accident aggravated a preexisting infirmity, the employer was liable for that portion of the disability and medical expense causally connected to the accident itself. *Clark v. Sage*, 95 Idaho 79, 502 P.2d 323 (1972).

**Construction.**

The provisions of former statute relating to the industrial special indemnity fund were not retroactive. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

**Liability of Fund.**

Commission's determination that claimant failed to establish prima facie that he was totally and permanently disabled under the odd-lot doctrine so as to render the industrial special indemnity fund liable for workers' compensation benefits was supported by substantial and competent evidence where claimant himself stated that he did not believe that the vocational counselors were attempting to find him specific employment, and where the

records supported the conclusion that claimant did not attempt any other types of employment, that efforts to find such employment would not be futile, that the vocational counselors' testimony was vague and their efforts to find employment for the claimant were unmotivated and minimal at best and that little weight should be given to their conclusions, and although claimant did have a significant disability, with his experience, education, training and physical abilities, he was employable. *Lethrud v. State, Indus. Special Indem. Fund*, 126 Idaho 560, 887 P.2d 1067 (1994).

**Purpose of Fund.**

The purpose of fund was to relieve the employer of a handicapped person of the responsibility of paying for total disability compensation to an employee rendered totally and permanently disabled because of his preexisting handicap coupled with a subsequent industrial injury. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931 (1968).

**72-324. Management of industrial special indemnity fund. —**

There is hereby created in the department of administration the office of manager of the industrial special indemnity fund, elsewhere in this chapter referred to as manager, whose duties shall be to administer the fund without liability on the part of the state or the manager beyond the amount of such fund. Among the powers of the manager shall be the power to evaluate, investigate, adjust claims made against the fund and make agreements, subject to the approval of the industrial commission, for compensation for injuries and occupational diseases in accordance with the provisions of this act, including the power to order payment from the fund for such medical, hospital and nursing care charges as injured persons or those suffering from occupational diseases may be entitled to from the fund.

The compensation of such manager shall be as provided in section 59-508, Idaho Code.

The manager shall be given notice of all applications, hearings and proceedings involving rights of the fund, and shall represent the fund in all proceedings brought to enforce a claim against it. The manager shall have the authority to employ such medical or other experts and to defray the expense thereof and of such witnesses as are reasonably necessary to administer, evaluate or defend the fund. The manager may also employ such employees as are necessary to assist in the administration of the fund. The manager may also employ legal counsel, or obtain legal counsel pursuant to



section 72-330, Idaho Code, to represent and conduct on behalf of the fund all suits, actions and proceedings whatsoever involving the fund.

The manager may, in his official name, sue and be sued in all the courts of the state and before the industrial commission in all actions or proceedings arising out of anything done or offered in connection with the industrial special indemnity fund or business related thereto.

The industrial commission shall compute and collect the assessment provided by section 72-327, Idaho Code, and shall make quarterly reports to the fund of the same. The manager of the fund shall, each quarter of each year, prepare and file with the industrial commission and the state treasurer a report of all expenses of administration, legal expenses and payments from the fund, which reports will be kept on file and open to inspection by any interested person.

The director of the department of administration shall appoint the manager from a list of at least three (3) names provided by the industrial commission. The manager shall serve at the pleasure of the director of the department of administration. [I.C., § 72-324, as added by 1978, ch. 264, § 2, p. 572; am. 1997, ch. 206, § 1, p. 620.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-324 which ch. 124, § 3, p. 422 was repealed by S.L. 1978, comprised I.C. § 72-324, as added by 1971, ch. 264, § 22.

**72-325. State treasurer custodian of fund — Duties.** — The state treasurer shall be custodian of the industrial special indemnity fund. [I.C., § 72-325, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 3, p. 572.]

**72-326. Deposit and investment of fund — Interest.** — The state treasurer shall deposit or, on order of the manager of the industrial special indemnity fund, invest any portion of the industrial special indemnity fund not needed for immediate or currently anticipated use, in the manner and subject to all the provisions of law respecting the depositing and investing of state funds by him. Interest earned by such portion of the fund so invested shall be collected by the state treasurer and placed to the credit of the fund. [I.C., § 72-326, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 4, p. 572.]

**72-327. Assessment — Method of calculation and proration — Time for payment.** — (1) The state insurance fund, every authorized self-insurer and every surety authorized under the Idaho insurance code or by the director of the department of insurance to transact worker's compensation insurance in Idaho, in addition to all other payments required by statute, shall, within thirty (30) days subsequent to September 1 and April 1 of each year, pay to the industrial commission for deposit in the industrial special indemnity fund an assessment as follows:

(a) The total annual assessment payable in the manner set forth in this section shall be equal in amount to two (2) times the amount of all

expenses of the industrial special indemnity fund incurred during the immediately preceding fiscal year less the existing cash balance of the industrial special indemnity fund as of the thirtieth day of June of the immediately preceding fiscal year;

(b) The total annual assessment shall be apportioned on a pro rata percentage basis among and between the state insurance fund, every authorized self-insurer and every surety authorized under the Idaho insurance code or by the director of the department of insurance to transact worker's compensation insurance in Idaho based upon the proportionate share of the total gross amount of indemnity benefits paid on Idaho worker's compensation claims during the applicable reporting period;

(c) The amount of each responsible entity's or person's assessment which is due and payable within thirty (30) days subsequent to September 1 and April 1 of any year shall be calculated by dividing one-half (1/2) of the total annual assessment amount by the responsible party's proportionate share of the total gross amount of indemnity benefits paid during the preceding period of time from January 1 through December 31. In no case shall the amount of any such assessment be less than two hundred dollars (\$200).

(2) In arriving at the total gross amount of indemnity benefits paid, the amount of indemnity benefits shall include those payments provided for or made under the provisions of the worker's compensation law with respect to "income benefits" as defined in section 72-102, Idaho Code.

(3) For the purposes of this section, the responsible entities or persons shall report to the industrial commission their total gross indemnity benefits paid during the twelve (12) month period from January 1 through December 31 no later than March 31 of the next succeeding year.

(4) A penalty for the late filing of any report required by this section will be assessed in accordance with the rules of the industrial commission.

(5) The industrial special indemnity fund shall certify to the industrial commission annually the amount of the assessment payable under this section and the industrial commission shall prepare and submit to each responsible entity or person notice of its pro rata amount payable hereunder on or before April 1, 1998, and thereafter on or before September 1 and April 1 of each succeeding year.

(6) For the purposes of this section, the cash balance of the industrial special indemnity fund in any fiscal year shall mean all money deposited or invested by the state treasurer to the credit of the industrial special indemnity fund pursuant to sections 72-325 and 72-326, Idaho Code, and all interest earned thereon.

(7) For purposes of this section, the term "fiscal year" shall mean that period of time commencing upon July 1 in any year and ending upon June 30 of the next succeeding year. [I.C., § 72-327, as added by 1997, ch. 206, § 3, p. 620; am. 2000, ch. 42, § 1, p. 82; am. 2006, ch. 247, § 1, p. 755.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-327 which comprised I.C., § 72-327, as added by 1986, ch. 93, § 2, p. 270; am 1988, ch. 351, § 1, p. 1050; am. 1994, ch. 180, § 234, p. 42 0, was



repealed by S.L. 1997, ch. 206, § 2, effective July 1, 1997.

**Amendments.** — The 2006 amendment, by ch. 247, in subsection (1), deleted “within thirty (30) days after April 1, 1998, and” preceding “within thirty (30) days” and “successive” preceding “year”; in subsection (1)(c), inserted “and April 1,” substituted “December 31” for “June 30,” and deleted the former second sentence, which read: “The amount of each responsible entity’s or person’s assessment which is due and payable within thirty (30) days subsequent to April 1 of any year shall be calculated by dividing one-half (½) of the total applicable assessment amount by the responsible entity’s or person’s propor-

tionate share of the total gross indemnity benefits paid on open worker’s compensation claims during the preceding period of time from July 1 through December 31”; and in subsection (3), substituted “twelve (12) month period from January 1” for “six (6) month period from July 1” and “no later than March 31” for “no later than January 31,” and deleted “and shall report their total gross indemnity benefits paid during the six (6) month period from January 1 through June 30 no later than July 31 of said year” from the end.

**Effective Dates.** — Section 2 of S.L. 2000, ch. 42 provided that the act shall be in full force and effect on and after July 1, 2000.

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Exemptions.

—Retraining benefits.

#### Exemptions.

##### —Retraining Benefits.

State Insurance Fund (SIF) was not required to pay five percent excise levy to Industrial Special Indemnity Fund (ISIF) on

retraining benefits paid to claimant since retraining benefits were “temporary total or temporary partial disability benefits,” which were statutorily exempt from levy. *Adams v. Caribou Mem. Hosp.*, 126 Idaho 1022, 895 P.2d 1215 (1995).

**72-328. Collection of delinquent assessments — Duty of attorney general — Penalties.** — (1) If any responsible entity or person required to make payment of an assessment as provided in this act shall fail to make full payment on or before ten (10) days following the time period specified in section 72-327, Idaho Code, for payment of the assessment, it shall be the duty of the attorney general to bring a civil action in the name of the state in the proper court to collect the amount of the assessment due. Any amount of assessment collected by the attorney general shall be deposited in the industrial special indemnity fund.

(2) Any responsible entity or person who is in default for ten (10) or more days in the payment of the assessment as set forth in this act shall be liable for a penalty for every ten (10) day period or any part thereof during which such failure continues. The penalty shall be in the amount of ten percent (10%) of the amount originally due. It shall be the duty of the attorney general to bring a civil action in the name of the state in the proper court to collect the amount of the penalty herein provided in addition to any unpaid assessment. Any amount of penalty and assessment collected by the attorney general shall be deposited in the industrial special indemnity fund.

(3) Any responsible surety or person who shall willfully misrepresent the amount of total gross indemnity benefits paid under the provisions of this act shall be liable to the state for a penalty in an amount ten (10) times the difference between the payments made and the amounts that should have been paid had such misrepresentation not been made. It shall be the duty of



the attorney general to bring a civil action in the name of the state in the proper court to collect the amount of the penalty herein provided in addition to any unpaid assessment. Any amount of penalty and assessment collected by the attorney general shall be deposited in the industrial special indemnity fund. [I.C., § 72-328, as added by 1997, ch. 206, § 4, p. 620.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-328 which comprised I.C., § 72-238, as added by 1986, ch. 93, § 3, p. 270; am. 1994, ch. 180, § 235, p. 420 was repealed by S.L. 1997, ch. 206, § 2, effective July 1, 1997.

**72-329. Disbursements.** — All disbursements from the industrial special indemnity fund shall be paid by the treasurer upon orders of the manager. Disbursements to beneficiaries not payable in a lump sum shall be made monthly. [I.C., § 72-329, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 6, p. 572.]

**72-330. Legal representation of fund.** — The attorney general shall appoint a member of his staff, if requested by the manager, pursuant to section 72-324, Idaho Code, to represent and conduct on behalf of the industrial special indemnity fund all suits, actions and proceedings whatsoever involving the fund. [I.C., § 72-330, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 7, p. 572.]

**72-331. Payment of administrative expenses.** — The manager shall have the authority to pay from the industrial special indemnity fund necessary expenses of administration involving the industrial special indemnity fund, including secretarial help, equipment and supplies, medical and other experts, witnesses, legal counsel, and similar aid and services. [I.C., § 72-331, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 8, p. 572.]

**72-332. Payment for second injuries from industrial special indemnity account.** — (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

(2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or

disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become employed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment. [I.C., § 72-332, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 9, p. 572; am. 1981, ch. 261, § 2, p. 552; am. 1991, ch. 155, § 1, p. 371.]

### STATUTORY NOTES

**Cross References.** — Deductions for pre-existing injuries and infirmities, § 72-406.

Employer's proportional liability in case of preexisting infirmity, § 72-406.

"Permanent disability" or "under a perma-

nent disability" defined, § 72-423.

"Permanent impairment" defined, § 72-422.

State's limited liability for state insurance fund, § 72-901.

### JUDICIAL DECISIONS

#### ANALYSIS

Aggravation of preexisting condition.

"Any cause or origin".

Apportionment.

— Findings required.

— Proof.

Burden of proof.

Combined effects.

Construction with other law.

Evidence.

Findings of commission.

Interpretation.

Legislative intent.

Liability of fund.

Manifestation of injury.

Nonmedical factors.

"Odd-lot" category.

Permanent physical impairment.

— Fund not liable.

— Progressive condition.

— Standard.

Preexisting permanent physical impairment.

Preexisting physical impairment.

Psychological disorder.

Purpose.

Requirement of medical diagnosis.

Settlement.

— With employer.

Stability of injury.

Total permanent disability.

#### **Aggravation of Preexisting Condition.**

Claimant could not litigate the issue of apportionment based upon the identical 33% whole person impairment rating he relied upon in entering into agreement with the state insurance fund and the state hospital for the agreement provided the plaintiff a lump sum award based upon his 33% whole

person impairment rating and since he then sought to attribute 13% of his 33% whole person impairment to a pre-existing condition, thereby increasing his whole person impairment rating to 46%, without presenting additional allegations of pre-existing impairment his claim against the industrial special indemnity fund was barred by the doctrine of



collateral estoppel. *Jackman v. State, Indus. Special Indem. Fund*, 129 Idaho 689, 931 P.2d 1207 (1997).

#### **"Any Cause or Origin".**

Under subsection (1) of this section, a pre-existing impairment can result from a previous industrial accident in which the employer and the industrial special indemnity fund shared liability. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

#### **Apportionment.**

Essentially, this statute provides for an apportionment of nonmedical factors between the employer/surety and the industrial special indemnity fund; the appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot case where the fund is involved, is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment. *Neilson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984).

There are four elements of a prima facie case for apportioning liability for a total permanent disability under this section: 1. whether there was a preexisting impairment. 2. whether the impairment was manifest. 3. whether the impairment was a subjective hindrance. 4. whether the impairment in any way combines in causing total permanent disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

Where there was no question that the prior injury did not combine with the recent injury to create total and permanent disability, because there was already total disability before the second injury ever occurred, it was inappropriate for the industrial commission to apportion total and permanent disability pursuant to the Carey formula between the industrial special indemnity fund (ISIF) and the employer. *Hamilton v. Ted Beamis Logging & Constr.*, 127 Idaho 221, 899 P.2d 434 (1995).

Industrial commission erred in its determination that medical benefits awarded to workers' compensation claimant who was totally and permanently disabled under the odd-lot doctrine could be assessed totally against employer's surety and were not apportionable under the 1990 version of this section; though that would be the case following the 1991 amendments to this section, this award of medical benefits had to be apportioned in the same proportion as the determined responsibility of the industrial special indemnity fund (ISIF) and employer's surety for the nonmedical portions of the award. *Dohl v. PSF Indus., Inc.*, 127 Idaho 232, 899 P.2d 445 (1995).

#### **—Findings Required.**

Where a claimant had suffered prior injuries which resulted in permanent partial dis-

ability and later was injured during the course of his employment as a county undersheriff, with the last injury resulting in 100 percent total and permanent disability, the industrial commission erred in holding as a matter of law that the employer's and the surety's liability could be calculated by subtracting claimant's permanent disability before the accident from the total compensation due, since this section required no finding of permanent disability prior to the last work-related injury. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

This section does not require a finding of permanent disability existing prior to a work-related injury, but requires a finding of a pre-existing permanent physical impairment and limits the employer's liability to the amount of disability attributable to the particular injury occurring in his employment; the indemnity fund is liable for the difference between the compensation that would be payable for the second injury alone and the total compensation due and the industrial commission must determine the ratio of apportionment. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

Where claimant's consolidated claims encompassed two independent work-related injuries caused by two separate accidents at different places of employment, and two non-work-related conditions for which compensation was sought, the industrial commission erred in apportioning liability based upon the impact of an injury which was not "preexisting" within the meaning of this section. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

Industrial commission's determination that employer at the time of injury was liable for a portion of the percentage of disability attributable to the injury, where a preexisting degenerative condition was accelerated by the injury, was affirmed, where supported by substantial and competent evidence, although, at the time of the injury, claimant had not reached total permanent disability. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

#### **—Proof.**

Testimony to a "medical probability," can be received in such manner as to which the parties may agree, or as the commission may direct, and the apportionment by the commission required by this section can be determined, also to a medical probability. *Bowman v. Twin Falls Constr. Co.*, 99 Idaho 312, 581 P.2d 770 (1978), overruled on other grounds, *Demain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999).

#### **Burden of Proof.**

If the evidence of the medical and nonmedical factors places a claimant prima facie in



the "odd-lot" category, that is a group of workers who are physically able to perform some work but are so handicapped that they will not be employed regularly in any well-known branch of the labor market, the burden is then on the employer or the special industrial indemnity fund to show that some kind of suitable work is regularly and continuously available to the claimant. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

In order to meet the burden of showing that some kind of suitable work was regularly and continuously available to a claimant, the fund could not merely show that the claimant was able to perform some type of work, but must establish that there was an actual job within a reasonable distance from the claimant's home which he was able to perform or for which he could be trained and which he would have a reasonable opportunity to obtain. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

Where a claimant whose injury in the course of his employment aggravated a pre-existing injury fell into the odd-lot category, the burden was shifted to the employer to show that some kind of suitable work was regularly and continuously available to the claimant. *Francis v. Amalgamated Sugar Co.*, 98 Idaho 407, 565 P.2d 1364 (1977).

The ultimate rating of permanent disability should be an administrative finding by the commission with no particular method of proof required, and a claimant is not required to present testimony of vocational experts expressing their opinions in numerical or percentage terms. *Bell v. Clear Springs Trout Co.*, 107 Idaho 568, 691 P.2d 1183 (1984).

The claimant has the burden of establishing a prima facie case of total disability within the odd-lot category; once the claimant meets his or her initial burden of establishing a prima facie case of total disability within the odd-lot category, the burden then shifts to the industrial special indemnity fund to show that some kind of suitable work is readily and continuously available to the claimant. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Burden of proof is on the party seeking to invoke the liability of the industrial special indemnity fund (ISIF) under the statute, to show that the disability would not have been total "but for" the pre-existing condition. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Where a vocational evaluator testified that taking into account the loss of worker's arm, the impairment to her hip, and the pre-exist-

ing conditions of her back and thumb, there were no jobs, among the 2500 he considered, the worker could perform, and where he indicated the specific ways in which the condition of her back eliminated her from some jobs and stated that the condition of her thumb prevented her from being able to handle equipment that required fine motor coordination, the evidence was sufficient to fulfill the requirement that but for the pre-existing impairments, worker would not have been totally and permanently disabled. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

### Combined Effects.

Because the "combined effects" requirement in subsection (1) of this section requires a claimant seeking to establish ISIF liability to also prove that the disability would not have been total but for the industrial injury, where the pre-existing impairment alone resulted in claimant's total disability, she could not recover from ISIF. *Bybee v. State, Indus. Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

The test to satisfy the "combined effects" requirement of subsection (1) of this section is whether, but for the industrial injury, the worker would have been totally and permanently disabled immediately following the occurrence of that injury. This encompasses both the combination scenario where each element contributes to the total disability, and the case where the subsequent injury accelerates and aggravates the pre-existing impairment. *Bybee v. State, Indus. Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

To satisfy the "combined effects" requirement in this section, a claimant must show that but for the pre-existing impairments, he would not have been totally and permanently disabled. *Eckhart v. State, Indus. Special Indem. Fund*, 133 Idaho 260, 985 P.2d 685 (1999).

### Construction With Other Law.

The focus in this section is on the employer's liability for payment of income benefits, as distinguished from the focus in § 72-431, which is on the employee's disability. Section 72-431, governing the inheritability of income benefits, applies only if an employee has sustained a disability less than total. Section 72-431 does not require consideration of how the total permanent disability benefits are paid, or by whom and is specific in referring only to whether or not the employee receives a total permanent disability award. *Palomo v. J.R. Simplot Co.*, 131 Idaho 314, 955 P.2d 1093 (1998).

**Evidence.**

Once the industrial commission places new evidence into the record, all parties should have a right to dispute that evidence by challenging its validity or by introducing additional or conflicting evidence; thus, it was error for the Commission not to allow the industrial special indemnity fund to dispute the physician's rating of 12% impairment with respect to the claimant's arm. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

**Findings of Commission.**

Where contested findings of the industrial commission are supported by substantial, competent evidence, those findings will not be disturbed on appeal; thus, although the evidence was conflicting as to whether claimant was a odd-lot worker, the commission's findings in this matter were supported by substantial and competent evidence and would not be disturbed on appeal. *Bell v. Clear Springs Trout Co.*, 107 Idaho 568, 691 P.2d 1183 (1984).

Record contained hearing testimony of worker and employer, which supported the commission's findings that worker's ataxic condition constituted a hindrance or obstacle to employment where worker and employer testified that worker told employer that she had problems standing on her feet and walking up stairs. *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989).

In a workmen's compensation case, the industrial commission's determination of disputed and conflicting facts and opinions of experts will be upheld if supported by substantial, competent evidence, and evidence is "substantial and competent" if a reasonable mind might accept such evidence as adequate to support a conclusion. *Wagar v. ASARCO, Inc.*, 127 Idaho 928, 908 P.2d 1235 (1996).

The industrial commission's lack of specific finding as to the date it assigned an impairment rating on claimant's preexisting blood condition is not fatal to its determination; as the fact finder and the evaluator of impairment, the commission's own determination of the impairment rating of claimant's blood disease, based upon the testimony of the claimant and the reports of his physicians, was held to be supported by substantial and competent evidence in the record. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

**Interpretation.**

The two-step process to determine permanent physical impairment announced in *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987) did not correctly interpret the 1981 amendment to sub-

section (2) of this section. To this extent *Mapusaga and Garcia v. J. R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989) are overruled. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

**Legislative Intent.**

Since the statutory definitions of "permanent physical impairment" under this section "permanent impairment" under § 72-422 and "permanent disability" under § 72-423 were originally enacted simultaneously by the legislature, it can be concluded that the legislature intended that they define three different, but related, classifications. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

**Liability of Fund.**

This section is phrased in the disjunctive, and not in the conjunctive, and if either condition exists, i.e., total permanent disability occasioned by the combined effects of both the preexisting impairment and the subsequent injury, or if the facts disclose aggravation and acceleration of the preexisting impairment by the industrial accident, then the liability of industrial special indemnity fund arises. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

An employee with a pre-existing permanent physical impairment, regardless of whether this injury came about as a result of a work-related accident or nonwork related accident, is entitled to recover from the industrial special indemnity fund; thus, the industrial special indemnity fund is not entitled to the defense contained in subsection (1) of § 72-208. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

The industrial special indemnity fund is liable when a pre-existing permanent physical impairment combines with a work-related injury to make an employee permanently and totally disabled. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Commission's determination that claimant failed to establish prima facie that he was totally and permanently disabled under the odd-lot doctrine so as to render the industrial special indemnity fund liable for workers' compensation benefits was supported by substantial and competent evidence where claimant himself stated that he did not believe that the vocational counselors were attempting to find him specific employment, and where the records supported the conclusion that claimant did not attempt any other types of employment, that efforts to find such employment would not be futile, that the vocational



counselors' testimony was vague and their efforts to find employment for the claimant were unmotivated and minimal at best and that little weight should be given to their conclusions, and although claimant did have a significant disability, with his experience, education, training and physical abilities, he was employable. *Lethrud v. State, Indus. Special Indem. Fund*, 126 Idaho 560, 887 P.2d 1067 (1994).

Special indemnity fund was not liable to the claimant pursuant to subsection (1) of this section, as the claimant did not show her pre-existing condition was aggravated and accelerated by a subsequent injury or occupational disease; rather, the most the claimant showed was a pre-existing impairment that grew worse over time, which was not covered under the statute. *Lopez v. State*, 136 Idaho 174, 30 P.3d 952 (2001).

### **Manifestation of Injury.**

Where worker, after work related accident which affected his right hip, had a later injury to his left hip, shoulder, and back due to arthritis and spondylolisthesis, the industrial special indemnity fund (ISIF) could not be liable to worker even if worker were determined to be totally and permanently disabled, based in part, on the impairment of his left hip, his shoulders, and his back since worker's asymptomatic arthritis and spondylolisthesis had not manifested themselves at the time of the injury to his right hip; although these underlying conditions were in existence, there was no evidence that either worker or employer were aware of the conditions. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989) (prior to 1981 amendment).

### **Nonmedical Factors.**

It was not error for the commission to conclude that a claimant's physical appearance and history of excessive alcohol consumption constituted pertinent nonmedical factors under §§ 72-425 and 72-430, rather than physical impairments under either this section or § 72-406, where the industrial commission found that claimant's physical appearance and history of excessive alcohol consumption did not hinder him in his earning capacity prior to the accident, where, since he was a teenager, claimant had functioned in the manual labor market without suffering any loss of potential earning capacity, and where claimant's physical appearance and history of excessive alcohol consumption had not served as a hindrance in that job market. *Roberts v. Asgrow Seed Co.*, 116 Idaho 209, 775 P.2d 101 (1989).

### **"Odd-lot" Category.**

Where a claimant was a 48-year-old male with a ninth-grade education whose voca-

tional training was confined solely to heavy manual labor which he could no longer perform as a result of back injuries, and where he lived in a small mountain community where opportunities for light work were limited, the claimant fell within the "odd-lot" category of claimants as a matter of law, and the burden was on the industrial special indemnity fund to show that some kind of suitable work was regularly and continuously available to the claimant. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

Where a claimant whose injury in the course of his employment aggravated an existing injury to his back had the equivalent of a twelfth-grade education, was in his mid-forties, had always done heavy labor, was unable to do such labor since the accident and consequently had not found permanent employment, and where the evidence indicated that there was no stable labor market for the type of work which the claimant could perform, the claimant had made out a prima facie case that he should be placed in the odd-lot category. *Francis v. Amalgamated Sugar Co.*, 98 Idaho 407, 565 P.2d 1364 (1977).

The claimant satisfied her burden of proof and showed that she was totally and permanently disabled within the odd-lot category, where she attempted to return to work, but because of her various injuries had not been able to do so, the type of work she was able to perform was limited in nature, and various doctors testified that she was unable to work. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Where, although there was evidence that after the injury the claimant worked for several employers doing baby-sitting and elderly care-taking, the claimant provided evidence from expert medical testimony indicating that she should avoid stress and not work alone, there was evidence that baby-sitting and elderly care-taking jobs were very sporadic, and two psychiatrists and a rehabilitation expert testified that these occupations were inappropriate for the claimant, and, in fact, dangerous to those for whom she cared, there was no suitable work for the claimant, and she was totally and permanently disabled within the odd-lot category. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Where worker suffered a back injury and had had two prior work-related back injuries, industrial commission correctly concluded that worker had not sustained the burden of proving that he fell in the odd-lot category; worker failed to establish the prima facie case



of odd-lot status which was to prove the unavailability of suitable work, and there was evidence in the record that there was employment available for worker that he was capable of performing. *Huerta v. School Dist.* # 431, 116 Idaho 43, 773 P.2d 1130 (1989).

Employee sustained his burden of proving that while he was physically able to perform some work, he was so handicapped that he would not be employed regularly in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on his part; this is the formulation of "odd-lot" worker. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

Where estimates as to the portion of the jobs employee could have performed before his accident that he was precluded from performing after the accident ranged from 20 percent to 80 percent, the employee was not an "odd-lot" worker as a matter of law. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

There are three methods by which the employee may prove a prima facie case of "odd-lot" status: (1) by showing what other types of employment the employee has attempted, (2) by showing that the employee, or vocational counselors, employment agencies, or the Job Service on behalf of the employee, have searched for other work for the employee, and that other work was not available, or (3) by showing that any efforts of the employee to find suitable employment would have been futile. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

There was substantial and competent evidence to support the industrial commission's findings that an employee did not establish a prima facie case that he was an odd-lot worker. *Nelson v. David L. Hill Logging*, 124 Idaho 855, 865 P.2d 946 (1993).

Where claimant sought permanent disability under the odd-lot status and there was conflict between testimony of claimant's vocational counselor that claimant was not capable of performing any job and the testimony of company's vocational expert that claimant was suitable for several types of jobs, since Commission found the testimony of company's vocational expert to be more credible and persuasive, claimant's claim was denied and claimant's argument that company expert's evaluation should not be persuasive because there are no specific jobs available in the categories for which she found him to be qualified was without merit, for it has never been held that unless a prima facie case of odd-lot disability is established, an employer or ISIF must prove that there is a specific job in existence in order to defeat a claim for total or permanent disability. *Boley v. State, Indus.*

*Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant sought compensation for total and permanent disability under the definition of odd-lot worker and the evidence of claimant's vocational expert was that claimant was not capable of performing any type of job, but company's expert was of the opinion that even with claimant's partial disability there were still jobs he could perform, the questions of whether claimant was an odd-lot worker became a question of fact for the Commission to decide. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant for total disability failed to show that he had attempted other types of employment, that he did little to find work after leaving company, met with his vocational counselor only once, inquired about only a few jobs, and never sought employment in the area, and there was a conflict in the evidence about whether attempts to find employment would have been futile, he failed to establish odd-lot worker status. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

An employee may prove total disability under the odd-lot worker doctrine in one of three ways: 1. by showing that he has attempted other types of employment without success; 2. by showing that he or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; 3. by showing that any efforts to find suitable employment would be futile. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

The burden of proving a prima facie case of odd-lot status is on the claimant; however, where a dispute exists as to the extent of disability, the type of work the claimant is capable of performing, and the effort made to find suitable employment, whether the claimant is odd-lot status is a factual determination within the discretion of the Commission. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

A claimant may establish a prima facie case of odd-lot disability status as a matter of law only if the evidence is undisputed and is reasonably susceptible to only one interpretation. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where a claimant demonstrates that he fits within the definition of an odd-lot worker he has proven total and permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

#### **Permanent Physical Impairment.**

"Permanent physical impairment" is any permanent condition which reasonably could constitute a hindrance or obstacle to obtain-

ing employment or reemployment and such hindrance would exist if the preexisting permanent condition would reasonably cause a potential employer to be reluctant to hire a person because of concerns that the person's preexisting condition would make him a less capable worker, a greater risk in terms of getting injured, or a greater risk in terms of the amount of potential permanent disability that the worker would suffer from an injury; however, actual hindrance to one's attempts at obtaining employment is not required. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

A permanent physical impairment is any condition which could reasonably hinder or obstruct the future obtainment of employment; however, this is to be interpreted subjectively, i.e., whether the employee considers the condition a hindrance, and the fact that the claimant is employed does not create a presumption that the pre-existing injury is not a hindrance or obstacle. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

While the claimant's attitude toward the condition is some evidence whether it was a hindrance, the claimant's attitude does not necessarily play a decisive role in determining whether a "permanent physical impairment" exists under subsection (2) of this section. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

In determining whether a "permanent physical impairment" exists under this section, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would make the claimant totally and permanently disabled; the result now will be determined by the commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

In order to establish industrial special indemnity fund (ISIF) liability under this section, a claimant must prove that, prior to incurring an injury or occupational disease, he was suffering from a permanent physical

impairment as defined in § 72-422, with the further requirement under subsection (2) of this section, that the impairment be of a seriousness to hinder or present an obstacle to claimant obtaining employment or reemployment. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

#### —Fund Not Liable.

Where there was substantial and competent evidence to support the industrial commission's finding that claimant was totally and permanently disabled without any contribution from a preexisting physical impairment, even if claimant had a preexisting learning disability, the industrial special indemnity fund (ISIF) was not liable for any portion of claimant's disability. *Selzer v. Industrial Special Indem. Fund*, 124 Idaho 144, 857 P.2d 623 (1993).

The claimant was not entitled to benefits from the defendant indemnity fund where he failed to establish that but for his left eye and right arm impairments he would not have been totally and permanently disabled by his low-back injury. *Eckhart v. State, Indus. Special Indem. Fund*, 133 Idaho 260, 985 P.2d 685 (1999).

#### —Progressive Condition.

Worker's ataxia was a permanent physical impairment which triggered the liability of the industrial special indemnity fund (ISIF) despite ataxia being a progressive condition since subsections (1) and (2) of this section do not mention progressive or nonprogressive conditions. *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989).

#### —Standard.

The proper standard for the industrial commission to apply in cases determining whether a claimant had a preexisting permanent physical impairment constituting a hindrance or obstacle to employment is an objective standard which determines whether the condition reasonably could constitute a hindrance or obstacle to obtaining employment or reemployment, as opposed to a showing of actual hindrance. *Shea v. Bader*, 102 Idaho 697, 638 P.2d 894 (1981) (decision prior to 1978 and 1981 amendments).

A party asserting that the industrial special indemnity fund (ISIF) should be apportioned liability under this section, bears the burden of proving that an employee was suffering from a permanent physical impairment; the four elements of a prima facie case for apportioning liability for total and permanent disability are (1) whether there was a preexisting impairment, (2) whether the impairment was manifest, (3) whether the impairment was a subjective hindrance, and (4) whether the impairment in any way combines in caus-



ing total and permanent disability. *Wagar v. ASARCO, Inc.*, 127 Idaho 928, 908 P.2d 1235 (1996).

While a preexisting permanent physical impairment must constitute a hindrance or obstacle to obtaining employment or re-employment in order to be apportionable to the industrial special indemnity fund in a 100% disability case as provided for under this section, it need not be a hindrance or obstacle to obtaining employment or re-employment to constitute an apportionable preexisting physical impairment in cases involving less than total disability, as provided for under § 72-406(1). *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

### **Preexisting Permanent Physical Impairment.**

Where a claimant for disability compensation had previously been injured prior to taking the employment which caused the injury for which he was seeking compensation, such preexisting condition need not have actually hindered his efforts to obtain employment in the past in order to constitute a preexisting "permanent physical impairment" under subsection (2) of this section since "permanent physical impairment" is based on the effect the condition is likely or reasonably anticipated to have on obtaining employment. *Gugelman v. Pressure Treated Timber Co.*, 102 Idaho 356, 630 P.2d 148 (1981).

Where claimant's preexisting arthritic condition, which was subsequently aggravated by a work-related accident, was latent and asymptomatic, and thus not a hindrance to employment or reemployment under subsection (2) of this section, the industrial special indemnity fund (ISIF) was not liable for any disability resulting from the preexisting condition. *Jones v. State, Indus. Special Indem. Fund*, 104 Idaho 337, 659 P.2d 91 (1983).

Where an accident caused a flare-up of claimant's preexisting condition of rheumatoid arthritis and the aggravation of this condition caused him to become totally and permanently disabled, the claimant was entitled to permanent total disability income benefits from the industrial special indemnity fund. The industrial special indemnity fund's obligation to the claimant was reduced by the permanent impairment and disability caused by the accidental injury. *Waltman v. Associated Food Stores, Inc.*, 109 Idaho 273, 707 P.2d 384 (1985).

Where the claimant had a permanent partial impairment of 40% in the form of psychogenic pain syndrome, caused by the effects of the claimant's injury as it acted upon her preexisting personality disorder, the claimant did not have a preexisting permanent physical impairment as that term has been interpreted under this section. *Bruce v.*

*Clear Springs Trout Farm*, 109 Idaho 311, 707 P.2d 422 (1985).

A proper analysis of subsection (2) of this section requires a two-step process: (1) Whether the injured claimant considers the pre-existing impairment an obstacle or hindrance to further employment, and, if so, (2) whether a reasonable employer under the circumstances would consider the claimant's impairment to be of such a nature that any subsequent injury combined with the impairment would more likely make the claimant totally and permanently disabled. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Where, as a result of the arm injury, the claimant lost strength in her left arm and suffered numbness which resulted in a loss of control, lost dexterity in her middle finger and occasionally had sharp pain running up and down her arm, she testified to a limited use of her left hand when performing manual activities, and a vocational rehabilitation specialist testified that the condition of claimant's arm could reasonably cause a potential employer to be reluctant to hire the claimant because of concerns that the condition in her arm would make her a less capable worker and more likely to be injured again, there was sufficient evidence to support the finding by the Industrial Commission that the claimant's arm injury was a pre-existing permanent physical impairment within the meaning of subsection (2) of this section. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

While a preexisting permanent physical impairment must constitute a hindrance or obstacle to obtaining employment or re-employment in order to be apportionable to the industrial special indemnity fund in a 100% disability case as provided for under this section, it need not be a hindrance or obstacle to obtaining employment or re-employment to constitute an apportionable preexisting physical impairment in cases involving less than total disability, as provided for under § 72-406(1). *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

Where the industrial commission found that claimant's later employment by Department of Parks was essentially the equivalent of work provided by a sympathetic employer or friend and this conclusion was supported by the record, the finding that claimant was odd-lot totally permanently disabled prior to her most recent injury and the total permanent disability did not result from combined effects was affirmed. *Bybee v. State, Indus.*



Special Indemnity Fund, 129 Idaho 76, 921 P.2d 1200 (1996).

Where claimant suffered a series of injuries, and employer was held responsible for the portion of an earlier injury that was caused by industrial accident, the claim for which was resolved before apportionment was determined and before a classification of "pre-existing impairment" could be made, but that injury was medically stable before a subsequent injury was incurred, the industrial commission was able to make a determination that the earlier injury was ultimately preexisting. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

### **Preexisting Physical Impairment.**

A preexisting physical impairment within the meaning of subsection (2) of this section is any condition which reasonably could constitute a hindrance or obstacle to employment or reemployment when all known facts are or could reasonably be disclosed to the employer. *Royce v. Southwest Pipe*, 103 Idaho 290, 647 P.2d 746 (1982).

Employer knowledge is not a requirement to constitute a preexisting physical impairment. However, to constitute a "hindrance to employment" the condition must be manifest; "manifest" means that either the employer or employee is aware of the condition so that the condition can be established as existing prior to the injury. *Royce v. Southwest Pipe*, 103 Idaho 290, 647 P.2d 746 (1982).

Where a colloid cyst was undoubtedly present in the claimant's brain prior to his accident, but the cyst was asymptomatic prior to the accident and neither the claimant nor anyone else had any indication that the cyst existed, nor did the cyst adversely affect the claimant prior to the accident, and the testimony of doctors in the compensation action indicated that while the accident did not cause the occurrence of the cyst, it was common for such lesions to become symptomatic incident to head trauma and that the head trauma sustained by the claimant in the accident triggered the onset of clinical symptoms, the claimant's condition was not a preexisting physical impairment within the meaning of this section, and consequently, the employer and its surety were liable for the full amount of the claimant's disability benefits. *Royce v. Southwest Pipe*, 103 Idaho 290, 647 P.2d 746 (1982).

A preexisting physical impairment within the meaning of subsection (2) of this section is any condition which reasonably could constitute a hindrance or obstacle to employment, when all facts were disclosed, or reasonably could be disclosed, to the employer; actual hindrance to employment is not a prerequisite to a finding of a preexisting physical impairment and an objective test must be

utilized. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

"Permanent impairment," as defined in § 72-422 and incorporated by reference in this section as "permanent physical impairment" is confined to physical disabilities; thus, a preexisting personality disorder, consisting of hypersensitivity to potential rejection, unwillingness to enter relationships, depression, humiliation, anxiety, anger, and impaired ability to function socially, but manifesting no bodily symptoms, was not a permanent physical impairment within the meaning of this section and § 72-422, and the trial court erred in characterizing claimant's personality disorder as a preexisting physical impairment. *Hartley v. Miller-Stephan*, 107 Idaho 688, 692 P.2d 332 (1984).

The findings of the industrial commission on the issue of subjective hindrance should have focused on whether or not claimant's preexisting condition constituted a hindrance or obstacle to employment for the particular claimant. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

The basic definition of permanent impairment is "any anatomic or functional abnormality or loss" and claimant's brachysyndactylism was a preexisting physical impairment with this definition. *Hoye v. Daw Forest Prods., Inc.*, 125 Idaho 582, 873 P.2d 836 (1994).

An impairment, the claim for benefits on which is an open, unresolved, and viable claim at the time of a subsequent injury, and which had not reached medical stability at the time of the subsequent injury, does not constitute a preexisting injury under the worker's compensation statutes. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

Industrial commission's conclusion that the claimant's injury was preexisting and that the claimant was not entitled to relief from the industrial special indemnity account, was supported by substantial, competent, though conflicting evidence. *Redman v. State*, 138 Idaho 915, 71 P.3d 1062 (2003).

Industrial Commission did not err in apportioning claimant employee's disability between the employer and the Industrial Special Indemnity Fund because the employee's permanent partial disability (PPD) ratings for prior injuries were adequately taken into account by using their associated pre-existing physical impairment (PPI) ratings. *Clark v. Idaho Truss*, — Idaho —, 128 P.3d 941 (2006).

### **Psychological Disorder.**

Even though the claimant's personality disorder lacked physical manifestations, the industrial commission was correct in including the psychological disorder as a personal circumstance and allocating responsibility be-

tween the Special Indemnity Fund and the employer/surety. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

#### **Purpose.**

The purpose of second injury funds such as the special industrial indemnity fund is to encourage employers to hire partially incapacitated persons and to encourage partially incapacitated workers to seek employment. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981) (decision prior to 1978 and 1981 amendments).

The underlying policy of the fund is to allow an employer to hire a handicapped person with the obligation only to pay compensation for an industrial injury to the handicapped person such amount as the employer would have had to pay an employee who had not been handicapped, with the indemnity fund assuming responsibility for the balance of the total permanent disability. *Royce v. Southwest Pipe*, 103 Idaho 290, 647 P.2d 746 (1982).

An examination of the policy behind the creation of the industrial special indemnity fund indicates that the employer's liability for permanent partial impairment should not increase, simply because a claimant is totally and permanently disabled through application of the odd-lot doctrine because of injuries unrelated to the industrial accident; accordingly, the escalator provision of § 72-408(1) and (2) did not apply to the employer's share of liability in a case where the employee suffered a 50 percent partial disability due to his injury, but was found to be totally and permanently disabled under the odd-lot doctrine. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

#### **Requirement of Medical Diagnosis.**

Substantial and competent evidence supported the commission's finding of fact that worker's condition was "manifest" prior to her employment despite the absence of a medical evaluation of the condition after maximal medical rehabilitation had been achieved; the

concept of "permanent physical impairment" does not mandate the hypertechnical requirement of a definitive medical diagnosis of a claimant's preexisting physical impairment. *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989).

#### **Settlement.**

##### **—With Employer.**

Employee's claim against industrial special indemnity fund for benefits attributable to a pre-existing physical impairment was not precluded by an earlier settlement agreement between employee and his employer. *Tagg v. State, Indus. Special Indem. Fund*, 123 Idaho 95, 844 P.2d 1345 (1993).

#### **Stability of Injury.**

Stability is a key factor to consider when determining if a preexisting impairment exists: Where a claimant's previous injury becomes medically stable before he suffers the next injury, the industrial commission can correctly conclude that the injury was a pre-existing impairment. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

#### **Total Permanent Disability.**

If the Commission finds that the claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical facts, total and permanent disability has been established. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where Commission found that claimant suffered from a disability of 85% of the whole person and the finding was supported by competent evidence and not disputed by claimant, claimant failed to establish that he was totally and permanently disabled since his disability rating was less than 100%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

**Cited in:** *Bush v. Bonners Ferry Sch. Dist.* No. 101, 102 Idaho 620, 636 P.2d 175 (1981); *Bruce v. Clear Springs Trout Farm*, 109 Idaho 311, 707 P.2d 422 (1985); *Haffaker v. Red Lion Motor Inn-Riverside*, 122 Idaho 464, 835 P.2d 1275 (1992).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Aggravation of preexisting condition.  
Arm or hand.  
Appeal.  
Award.  
Benefits payable by employer.  
Blindness.  
Burden of proof.  
Evidence.  
Notice of claim.  
Parties to proceed.



Silicosis.

Statute of limitations.

Total disability.

### **Aggravation of Preexisting Condition.**

Where an injury resulted partly from accident and partly from a preexisting disease, it is compensable if the accident hastened or accelerated the ultimate result, and it was immaterial that the claimant would, even if the accident had not occurred, have become totally disabled by the disease eventually. *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

### **Arm or Hand.**

Claimant, who was paid compensation by his employer for partial permanent disability as result of loss of use of right arm and hand in an industrial accident, was entitled to recover for total permanent disability from second injury fund due to prior loss of use of left hand. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

### **Appeal.**

In proceeding for compensation based on occupational disease finding of board apportioning disability to the various factors involved was binding on appeal where findings were supported by substantial competent evidence. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

### **Award.**

The Supreme Court ordered an award in favor of claimant for the amount of compensation to which he was entitled under the statutes in proceeding brought where total loss of vision had been sustained as a result of an accident arising out of and in the course of employment, the court holding the evidence did not sustain a finding that such workman was not totally and permanently disabled. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

### **Benefits Payable by Employer.**

An employee who, prior to his injury was totally blind in his right eye and had 20% vision in his left eye corrected to 85% with glasses was, upon becoming wholly blind as the result of an industrial accident, entitled to total disability benefits of \$45.00 a week for 400 weeks with 120 weeks at \$30.00 a week to be paid by the employer and the remainder from special indemnity fund, the employer's liability for loss of the sight of the left eye not being reduced by the fact that his vision prior to the accident, uncorrected by glasses was only 20%. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931 (1968).

### **Blindness.**

When an employee, who was industrially blind in his right eye, received an injury by

accident which resulted in the loss of his left eye, he was entitled to recover compensation from the special indemnity fund. *McDonald v. State Treasurer*, 52 Idaho 535, 16 P.2d 988 (1932).

The term "industrially blind" was not defined in our law and its use was depreciated. No particular percentage of normal vision could or should have been used as a standard to constitute industrial blindness but each case had to depend upon its particular facts and circumstances. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Use of corrective glasses could be considered in determining disability for work, but not in determining specific indemnity under former § 72-313. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

### **Burden of Proof.**

The burden of proof was upon claimant seeking to recover under occupational disease statute to show compensatory disablement. *Hill v. Sullivan Mining Co.*, 68 Idaho 574, 201 P.2d 93 (1948).

### **Evidence.**

Board in considering whether above surface work involved claimant in hazardous exposure to silica dust was entitled to admit evidence by employer of sampling of air where claimant worked, if conditions at the time of sampling were similar to conditions at the time of claimant's work. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Board in determining whether claimant had been hazardedly exposed to silica dust did not err in refusing to admit exhibits of minutes of union-management safety committee concerning dusty conditions in locations where claimant had worked, since exhibits constituted hearsay evidence. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Claimant's condition of silicosis, grade 2 was not aggravated by exposure to silica dust where evidence showed that silicosis, grade 2 had not progressed as result of exposure. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

### **Notice of Claim.**

Claim against second injury fund was timely where letter mailed to board seeking additional compensation was received within four years of date of accident though amended petition was not filed within four year period, since petition reverted back to date of filing of original letter. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).



**Parties to Proceed.**

In proceeding involving the second injury fund the state treasurer was not a necessary party since he merely made disbursements from the funds, and therefore it was not necessary to give notice to the state treasurer of injury upon which claim against the fund was based. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

**Silicosis.**

Where board made a finding that silicosis was a contributing factor along with other factors to claimant's total disability, an award of 25% of total disability, which represented the proportion of silicosis to the other factors causing total disability, was proper rather than 100% total disability as contended for by

claimant. *Peterson v. Sunset Minerals, Inc.*, 75 Idaho 354, 272 P.2d 692 (1954).

**Statute of Limitations.**

Statute of limitations relative to giving of notice and making claims did not apply to proceeding to recover compensation from second injury fund, since payments were not made from second injury fund until after employer had completed payment of compensation. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

**Total Disability.**

A workman having lost the sight of both eyes was not ipso facto totally and permanently disabled. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

**72-333. Perpetual appropriation.** — All moneys which may come into the industrial special indemnity fund are hereby perpetually appropriated to the department of administration to be expended by it for the purposes stated in sections 72-331 and 72-332, Idaho Code. [I.C., § 72-333, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 10, p. 572.]

**72-334. Filing notice of claim with the industrial special indemnity fund — Time for filing — Records to be included with notice of claim — Jurisdictional effect.** [Null and void June 30, 2008.] — Any claimant, employer or surety making a claim for benefits with the industrial special indemnity fund shall file a notice of claim with the manager not less than sixty (60) days prior to the date of filing of a complaint against the industrial special indemnity fund with the industrial commission seeking benefits from the industrial special indemnity fund. Such notice of claim shall include, but not be limited to, a detailed statement describing the disability claim and supporting documentation including relevant medical and vocational rehabilitation records. Failure to timely file a notice of claim with the manager shall require the involuntary dismissal of any complaint against the industrial special indemnity fund regarding the claim for benefits which the party seeking to join the industrial special indemnity fund may cause to be filed with the industrial commission. The manager shall evaluate the notice of claim and shall approve or deny the claim or make an offer of settlement within the sixty (60) day period. If, in the discretion of the manager, the notice of claim is determined to be incomplete, the manager may, upon written notice to the party seeking to join the industrial special indemnity fund, extend the time period for evaluation of the claim for a maximum of thirty (30) days in order to request the necessary documents and records. The manager shall approve or deny the claim or make an offer of settlement within the extended period. [I.C., § 72-334, as added by 1997, ch. 303, § 1, p. 905.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1997, ch. 303, as amended by § 1 of S.L. 1999, ch. 197, effective July 1, 1999, and as amended by S.L. 2004, ch. 100, § 1, effective March 19,

2004, read: "Section 1 of this act shall be in full force and effect on and after July 1, 1997, and shall be null, void, and of no force and effect on and after June 30, 2008."

## CHAPTER 4

## BENEFITS

## SECTION.

- 72-401. Dependency — When determined.
- 72-402. Waiting period.
- 72-403. Penalty for malingering — Denial of compensation.
- 72-404. Lump sum payments.
- 72-405. Trustee in case of lump sum payment.
- 72-406. Deductions for preexisting injuries and infirmities.
- 72-407. Certain injuries deemed total and permanent.
- 72-408. Income benefits for total and partial disability.
- 72-409. Maximum and minimum income benefits for total disability.
- 72-410. Dependents.
- 72-411. Time of dependency.
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- 72-413. Income benefits for death.
- 72-413A. Lump sum payment upon remarriage.
- 72-414. Apportionment benefits between classes.
- 72-415. Change in dependents.
- 72-416. Maximum and minimum income benefits for death.
- 72-417. Maximum total payment.
- 72-418. Computation of weeks and days.
- 72-419. Determination of average weekly wage.
- 72-420. Compensation to state when dependency not claimed or proved.
- 72-421. Refund of payment to state after delayed proof of claim by minor or incompetent dependent.
- 72-422. Permanent impairment.
- 72-423. Permanent disability.
- 72-424. Permanent impairment evaluation.
- 72-425. Permanent disability evaluation.
- 72-426. The whole man — A period of five hundred weeks.
- 72-427. Permanent impairment evaluation not exclusive.

## SECTION.

- 72-428. Scheduled income benefits for loss or losses of use of bodily members.
- 72-429. Unscheduled permanent disabilities.
- 72-430. Permanent disability — Determination of — Percentages — Schedule.
- 72-431. Inheritability of scheduled or unscheduled income benefits.
- 72-432. Medical services, appliances and supplies — Reports.
- 72-433. Submission of injured employee to medical examination or physical rehabilitation.
- 72-434. Effect of refusing medical examination — Discontinuance of compensation.
- 72-435. Injurious practices — Suspension or reduction of compensation.
- 72-436. Burial expenses.
- 72-437. Occupational diseases — Right to compensation.
- 72-438. Occupational diseases.
- 72-439. Actually incurred/nonacute occupational disease.
- 72-440. Time of dependency — Death benefits.
- 72-441. No compensation in case of misrepresentation.
- 72-442. [Repealed.]
- 72-443. Period of exposure in silicosis cases.
- 72-444. No compensation for partial disability from silicosis.
- 72-445. Compensation for total disability or death from complicated silicosis.
- 72-446. Nondisabling silicosis — Compensation upon severance from employment.
- 72-447. Recurring dermatitis.
- 72-448. Notice and limitations.
- 72-449. Post mortem examination.
- 72-450. Retraining.
- 72-451. Psychological accidents and injuries.

**72-401. Dependency — When determined.** — Dependency shall initially be determined as of the time of the accident causing the injury or of manifestation of an occupational disease for purposes of income benefits therefor, and as of the time of death for purposes of income benefits for death. [I.C., § 72-401, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Dependency limitations, § 72-102.

Dependency, time of, § 72-411.

Dependency, time of, death benefits from

occupational disease, § 72-440.

**Comparable Provisions.** — See note under § 72-101.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

**Parents.**

Parents received compensation only if dependent on the child injured or killed.

Stample v. Idaho Power Co., 92 Idaho 763, 450 P.2d 610 (1969).

**72-402. Waiting period.** — (1) An injured employee shall not be allowed income benefits for the first five (5) days of disability for work; provided, if the injury results in disability for work exceeding two (2) weeks, income benefits shall be allowed from the date of disability and be paid no later than four (4) weeks from date of disability. Provided, further, that the waiting period shall not apply if the injured employee is hospitalized as an in-patient.

(2) The day on which the injury occurred shall be included in computing the waiting period unless the employee has been paid wages for that day. [I.C., § 72-402, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 208, § 3, p. 1538.]

**72-403. Penalty for malingering — Denial of compensation.** — If an injured employee refuses or unreasonably fails to seek physically or mentally suitable work, or refuses or unreasonably fails or neglects to work after such suitable work is offered to, procured by or secured for the employee, the injured employee shall not be entitled to temporary disability benefits during the period of such refusal or failure. [I.C., § 72-403, as added by 1971, ch. 124, § 3, p. 422; am. 1997, ch. 274, § 4, p. 799.]

### JUDICIAL DECISIONS

#### ANALYSIS

“Odd-lot” worker.

Refusal to cross picket line.

Suitable work.

**“Odd-Lot” Worker.**

Employee sustained his burden of proving that while he was physically able to perform some work, he was so handicapped that he would not be employed regularly in any well-known branch of the labor market absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on his part; this is the formulation of “odd-lot” worker. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

Where estimates as to the portion of the

jobs employee could have performed before his accident that he was precluded from performing after the accident ranged from 20 percent to 80 percent, the employee was not an “odd-lot” worker as a matter of law. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

Where employee satisfied his burden of showing a prima facie case of being an “odd-lot” worker, the burden then shifted to the employer and its surety to demonstrate the availability of regular employment within the employee’s capabilities. *Dumaw v. J.L. Norton*



Logging, 118 Idaho 150, 795 P.2d 312 (1990).

There are three methods by which the employee may prove a prima facie case of "odd-lot" status: (1) by showing what other types of employment the employee has attempted, (2) by showing that the employee, or vocational counselors, employment agencies, or the Job Service on behalf of the employee, have searched for other work for the employee, and that other work was not available, or (3) by showing that any efforts of the employee to find suitable employment would have been futile. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

#### **Refusal to Cross Picket Line.**

Claimant was not a partially disabled employee, for purposes of this section, at the time he refused to cross a picket line and return to work where his doctor was of the opinion that claimant didn't have any permanent disability and had released him to work without any limitations and where claimant had been working for approximately three

months before the strike was called; therefore, claimant was not precluded from receiving benefits for a subsequent finding of permanent partial disability because he refused to cross the picket line, which refusal resulted in his permanent replacement. *Baker v. Louisiana Pac. Corp.*, 123 Idaho 799, 853 P.2d 544 (1993).

#### **Suitable Work.**

The industrial commission did not commit error when it placed the burden on employer to demonstrate that after claimant moved to Yreka for surgery and treatment, a reasonable offer for employment had been made or that suitable employment was generally available in the market, because after claimant moved to Yreka, the employer's offer and procurement of a position at the guard shack in Idaho became unreasonable. *Perkins v. Croman, Inc.*, 134 Idaho 721, 9 P.3d 524 (2000).

**Cited in:** *Gomez v. Rangen's, Inc.*, 105 Idaho 337, 670 P.2d 42 (1983).

### **RESEARCH REFERENCES**

**C.J.S.** — 100 C.J.S., *Workers' Compensation*, §§ 553, 558, 559, 597, 736.

**72-404. Lump sum payments.** — Whenever the commission determines that it is for the best interest of all parties, the liability of the employer for compensation may, on application to the commission by any party interested, be discharged in whole or in part by the payment of one or more lump sums to be determined, with the approval of the commission. [I.C., § 72-404, as added by 1971, ch. 124, § 3, p. 422; am. 1975, ch. 13, § 1, p. 18.]

### **STATUTORY NOTES**

**Cross References.** — Insane person's compensation paid to guardian, § 72-226.

Minor employees, lump sum in jurisdiction of courts, § 72-225.

Modification of award not permitted after commutation, § 72-719 when payable to trustee, § 72-405.

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

Claim barred.

Dismissal without lump-sum payment.

Evidence.

Final decision.

#### **Claim Barred.**

Claimant could not litigate the issue of apportionment based upon the identical 33% whole person impairment rating he relied upon in entering into the agreement with the state insurance fund and the state hospital

for the agreement provided the plaintiff a lump sum award based upon his 33% whole person impairment rating and since he then sought to attribute 13% of his 33% whole person impairment to a pre-existing condition, thereby increasing his whole person im-

pairment rating to 46%, without presenting additional allegations of pre-existing impairment his claim against the Industrial Special Indemnity Fund was barred by the doctrine of collateral estoppel. *Jackman v. State, Indus. Special Indem. Fund*, 129 Idaho 689, 931 P.2d 1207 (1997).

#### **Dismissal Without Lump-Sum Payment.**

Where plaintiff employee decided not to pursue his Workers' Compensation Act claim against defendant employer, and stipulated with the employer for a dismissal with prejudice, approval of the stipulation did not implicate § 72-711 or this section, as there was no lump sum settlement, and a lump sum settlement was not the only way to permanently settle workers' compensation claims. *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005).

#### **Evidence.**

Where the finding of the Industrial Commission, that no false representation had

been made by the surety or the employer to induce the claimant to enter into the lump sum settlement agreement, was clearly supported by the evidence, the Commissioner did not err in refusing to set aside the lump sum settlement agreement. *Vogt v. Western Gen. Dairies, Inc.*, 110 Idaho 782, 718 P.2d 1220 (1986).

#### **Final Decision.**

A lump sum settlement agreement constitutes a final decision of the Industrial Commission which is subject to a motion for reconsideration or rehearing under the provisions of § 72-718. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986).

**Cited in:** *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 106 P.3d 455 (2005); *Clark v. Idaho Truss*, — Idaho —, 128 P.3d 941 (2006).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Discretion of board.

Finality.

Modification.

#### **Discretion of Board.**

Intent of Workmen's Compensation Act was to safeguard compensation award, and such award in lump sum should have been approved by courts only for strong and urgent reasons. *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927).

Mere fact that there was sufficient evidence to justify commission or Supreme Court in arriving at conclusion different from that reached does not show that commission abused its discretion in denying lump sum settlement. *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927).

The statute made lump sum settlement question in discretion of board, and such discretion was not questioned save in case of abuse. *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927).

#### **Finality.**

A compensation agreement and lump settlement thereon approved by the board became final and conclusive when no appeal from award was made within 30 days and employee could not thereafter attack the award on the ground of fraud. *Limprecht v.*

*Bybee*, 76 Idaho 293, 281 P.2d 1047 (1955).

A "change of condition" was not a sufficient ground for setting aside a lump sum settlement since the effect of this section and section providing modification of awards and agreements was to make a lump sum settlement final and not subject to review. *Fountain v. T.Y. & Jim Hom*, 92 Idaho 928, 453 P.2d 577 (1969).

Where surety, employer, and claimant entered into a settlement agreement subsequently approved by the board, and no appeal was taken to the Supreme Court within 30 days, the agreement had the same force and effect as a final award by the board and could not be set aside absent a showing of fraud. *Fountain v. T.Y. & Jim Hom*, 92 Idaho 928, 453 P.2d 577 (1969).

#### **Modification.**

Provision in compensation agreement that it was subject to modification applied as long as instalments were paid under the agreement, but it did not apply after a lump settlement was made and approved under this section. *Limprecht v. Bybee*, 76 Idaho 293, 281 P.2d 1047 (1955).

**72-405. Trustee in case of lump sum payment.** — Whenever for any reason the commission deems it expedient, any lump sum to be paid as provided in section 72-404, shall be paid to some suitable person or

corporation appointed as trustee to administer or apply the same for the benefit of the person or persons entitled thereto in the manner provided by the commission. The receipt of such trustee for the amount so paid shall discharge the employer or anyone else who is liable therefor. [I.C., § 72-405, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Insane person's compensation paid to guardian, § 72-226.

#### **72-406. Deductions for preexisting injuries and infirmities. —**

(1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

(2) Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease. [I.C., § 72-406, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Payment for certain preexisting impairments from industrial special indemnity fund, § 72-332.

### JUDICIAL DECISIONS

#### ANALYSIS

Apportionment of disability.

Nonmedical factors.

Preexisting injury or impairment.

#### **Apportionment of Disability.**

Where worker, after work related accident which affected his right hip, had a later injury to his left hip, shoulder, and back due to arthritis and spondylolisthesis, under this section, employer was liable only for the disability resulting from the injury to worker's right hip; employer was not liable for any disability caused by impairments to the left hip, the two shoulders, or the back even though these impairments were a part of worker's permanent disability under §§ 72-425 and 72-430. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

Apportionment between industrial injuries and preexisting physical impairments under this section does not depend upon the pre-existing condition being a "hindrance or ob-

stacle" to obtaining employment. *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

The industrial commission's apportionment under this section must be explained with sufficient rationale to enable the Supreme Court to review whether the apportionment is supported by substantial and competent evidence. The application of the formula devised in *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984), to apportionments under this section does not present substantial competent evidence to justify the apportionment that is made. *Reiher v. American Fine Foods*, 126 Idaho 58, 878 P.2d 757 (1994).

Decision of the industrial commission mandated an apportionment under the statute as the employee suffered from extensive preex-



isting injuries as the result of his motorcycle accident from which he never recovered; the commission had evidence to support its finding that the employee's permanent disability resulting from the industrial accident — inclusive of impairment — was 15%, for which the employer was liable. *Seufert v. Larson*, 137 Idaho 589, 51 P.3d 403 (2002).

Industrial Commission's apportionment of the employee's disability was improper where the Commission's apportionment was incorrectly done by mechanically applying the Carey formula. The supreme court stated that the Commission needed to provide an analysis as to why disability should have been apportioned in the same ratio as impairment. *Henderson v. McCain Foods*, — Idaho —, 130 P.3d 1097 (2006).

#### **Nonmedical Factors.**

It was not error for the commission to conclude that a claimant's physical appearance and history of excessive alcohol consumption constituted pertinent nonmedical factors under §§ 72-425 and 72-430, rather than physical impairments under either § 72-332 or this section, where the industrial commission found that claimant's physical appearance and history of excessive alcohol consumption did not hinder him in his earning capacity prior to the accident, where, since he was a teenager claimant had functioned in the manual labor market without suffering any loss of potential earning capacity, and where claimant's physical appearance and history of excessive alcohol consumption had not served as a hindrance in that job market. *Roberts v. Asgrow Seed Co.*, 116 Idaho 209, 775 P.2d 101 (1989).

The Carey formula which was adopted by the Supreme Court in *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984), applies in Industrial Special Indemnity Fund cases and should not be mechanically applied to all nonmedical apportionment issues; therefore, where the industrial commission applied the Carey formula to apportion employee's disability caused by nonmedical factors, its decision was vacated. *Weygint v. J.R. Simplot Co.*, 123 Idaho 200, 846 P.2d 202 (1993).

#### **Preexisting Injury or Impairment.**

Where the evidence showed that the claimant suffered a heart attack during the course

of his employment, but the only evidence presented to the industrial commission in support of its determination that the claimant suffered a permanent partial impairment of 50 percent of the whole person failed to consider a preexisting heart condition, such determination was not supported by the evidence. *Johnson v. Amalgamated Sugar Co.*, 108 Idaho 765, 702 P.2d 803 (1985).

While a preexisting permanent physical impairment must constitute a hindrance or obstacle to obtaining employment or re-employment in order to be apportionable to the Industrial Special Indemnity Fund in a 100% disability case as provided for under § 72-332, it need not be a hindrance or obstacle to obtaining employment or re-employment to constitute an apportionable preexisting physical impairment in cases involving less than total disability, as provided for under this section. *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

Evidence supported industrial commission's finding that although claimant was found to have a permanent disability of 30% of the whole person after his second injury, because most of his limitations existed prior to the second injury, the portion of claimant's disability resulting from the second injury did not exceed the portion of the physical impairment rating of five percent attributable to that injury; the remainder of claimant's disability rating accrued prior to the 1989 injury, thus insurer was not liable for that portion. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

Where employee suffered a back injury in an industrial accident and employee had incurred previous back injuries, the commission's decision not to apportion employee's permanent disability was nevertheless supported by substantial medical evidence where the first of orthopedic surgeon's three letters indicated that all of employee's lower back problems occurred while working for the employer although subsequent letters apportioned a small percentage of the disability to a preexisting condition. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002).

**Cited in:** *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982); *Edwards v. Harold L. Harris Constr.*, 124 Idaho 59, 856 P.2d 96 (1993); *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Apportionment of disability.  
Arm injury.  
Compromise settlement.  
Constitutionality.  
Death awards.

Leg injury.

Medical expense.

Physical condition prior to injury.

### Apportionment of Disability.

Where injuries resulted partly from accident and partly from preexisting weakness or disease, board had to separate result and apportion award accordingly. *Hanson v. Independent Sch. Dist. 11-J*, 50 Idaho 81, 294 P. 513 (1930).

If the removal of the diseased kidney was not made necessary by reason of the injury the claimant sustained, he was not entitled to an operation and compensation. *Cole v. Fruitland Canning Ass'n*, 64 Idaho 505, 134 P.2d 603 (1943).

Employee was held entitled to disability award notwithstanding that arthritic condition existing at time of injury would in time totally disable the employee. *Zipse v. Schmidt Bros.*, 66 Idaho 30, 154 P.2d 171 (1944).

Where medical testimony conflicts, it is incumbent on board to find apportionable compensation norm of employee's disability. *Zipse v. Schmidt Bros.*, 66 Idaho 30, 154 P.2d 171 (1944).

Where claimant on March 30 injured his back and also injured back on November 8 following his return, the second accident only aggravated injury sustained in first accident, hence there was no need for a deduction or apportionment of liability since claim was for one injury. *Harris v. Bechtel Corp.*, 74 Idaho 308, 261 P.2d 818 (1953).

Apportionment of one-half of hospital expenses and all of medical expenses to industrial accidents involving back was proper though claimant was treated for stiffness of back muscle by veterans administration prior to accidents. *Harris v. Bechtel Corp.*, 74 Idaho 308, 261 P.2d 818 (1953).

Where the board had no substantial competent evidence, it was error to find against employer's surety for 1955 that an exacerbation in 1955 was the result of an accident in that year, rather than as a result of an injury to claimant prior to 1955. *Beard v. Post Co.*, 82 Idaho 38, 348 P.2d 939 (1960).

The apportionment of the liability for temporary total disability and medical and hospital expenses following the second injury as well as specific indemnity for residual partial permanent disability are all subject to apportionment. *Lindskog v. Rosebud Mines, Inc.*, 84 Idaho 160, 369 P.2d 580 (1962).

The cause should have been remanded to the industrial accident board with direction to consider evidence as to what apportionment, if any, should have been made between back injuries known to have been sustained in 1958 and recurrence of the situation in 1961 when back pain arose when claimant was lifting a large sack of potatoes since a deter-

mination of the question as to whether apportionment should be made is material and necessary to the decision of this case. *Andrus v. Boise Fruit & Produce Co.*, 84 Idaho 245, 371 P.2d 256 (1962).

The industrial accident board was authorized and required to find the causes of disability if attributable to more than one factor and to apportion the disability accordingly. This may have required apportionment between an industrial injury and a preexisting injury or infirmity as well as between successive industrial injuries; and such included apportionment of hospital, medical and kindred expenses. *Clark v. Brennan Constr. Co.*, 84 Idaho 384, 372 P.2d 761 (1962).

The industrial accident board, specializing in the hearing of industrial accident cases, had to be presumed by its experience to be able to judge the causative factors in a particular case. The board had to be allowed a degree of latitude in making the apportionment. *Clark v. Brennan Constr. Co.*, 84 Idaho 384, 372 P.2d 761 (1962).

In awarding compensation for back injuries received in 1960 and 1963, failure to apportion compensation to nondisabling back injuries received prior to 1960 was not error where there was no competent evidence that the pre-1960 injuries contributed to the claimant's disability. *Cook v. Roland T. Romrell Co.*, 90 Idaho 155, 409 P.2d 104 (1965).

Where the board found that a prior injury from which the claimant no longer was suffering disability contributed to the disability resulting from a second injury and that part of the required surgery was due to the first injury, it was proper to apportion both the disability and the medical expenses between the two employers. *Dawson v. Hartwick*, 91 Idaho 561, 428 P.2d 480 (1967).

The board was authorized and required to apportion the degree and duration of disability between the injury resulting from the accident and that resulting from any preexisting injury or infirmity. *Scott v. Aslett Constr. Co.*, 92 Idaho 834, 452 P.2d 61 (1969), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

Where testimony at hearings indicated there was substantial and competent, although arguably conflicting, evidence to support the finding of the board on apportionment as between injury and preexisting infirmity, court would not review such finding. *Scott v. Aslett Constr. Co.*, 92 Idaho 834, 452 P.2d 61 (1969), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97



Idaho 327, 543 P.2d 1167 (1975).

### **Arm Injury.**

Claimant, who was paid compensation by his employer for partial permanent disability as result of loss of use of right arm and hand in an industrial accident, was entitled to recover for total permanent disability from second injury due to prior loss of use of left hand. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

### **Compromise Settlement.**

Before the industrial accident board could approve an agreement for compensation, such agreement had to embrace the provisions of the law, or such provisions would be read into the same. *Hanson v. Independent Sch. Dist.* 11-J, 57 Idaho 297, 65 P.2d 733 (1937).

The ambit of power of the industrial accident board was circumscribed by the statutes respecting the award of compensation, and the board was without authority to award lesser or different compensation than that prescribed by law, and this situation was not changed by virtue of the fact that the employee was suffering at the time he received the injury of a preexisting and progressive disease. *Hanson v. Independent Sch. Dist.* 11-J, 57 Idaho 297, 65 P.2d 733 (1937).

Where employer entered into an agreement for payment of total temporary disability for loss of time and for payment of permanent partial disability for loss of leg such agreement was equivalent to factual finding of the board and was final and conclusive, but it did not bar the board in subsequent modification proceeding from finding total permanent disability or finding a greater degree of permanent partial disability based on changed conditions. *Nitkey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 73 Idaho 294, 251 P.2d 216 (1952).

### **Constitutionality.**

Section providing deductions for preexisting injuries and infirmities was constitutional, and did not violate the constitution with respect to the requirement that every act should embrace but one subject, and that should be expressed in the title. *Cole v. Fruitland Canning Ass'n*, 64 Idaho 505, 134 P.2d 603 (1934). See Const., Art. 3, § 16.

### **Death Awards.**

The Workmen's Compensation Law authorizing deductions for preexisting injuries and infirmities in computing compensation, if the degree or duration of disability resulting from the accident was increased, did not apply to an award for death, since the word "disability" as used in the statute did not include "death." *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

Where there was circumstantial evidence

that a workman with preexisting heart disease received an electric shock from exposed wires, which precipitated his death, the finding of the board that his death was due one-half to heart disease and one-half to electric shock would not be reversed on appeal. *Gjerner v. Potlatch Forests, Inc.*, 91 Idaho 15, 415 P.2d 301 (1966).

Where a deputy sheriff with preexisting hypertension with atherosclerosis suffered a fatal stroke as a result of physical exertion and emotional strain in performing his duties at the scene of an accident, the board properly apportioned the cause of his death two-thirds to his preexisting condition and one-third to his cerebral "accident." *Hammond v. Kootenai County*, 91 Idaho 208, 419 P.2d 209 (1966).

### **Leg Injury.**

Where an employee had a leg injury, for which he was paid compensation, and as a result of such injury, thereafter an amputation was necessary, and where the latter event was the result of accident and injury, payments made before amputation would not be taken into consideration in determining the indemnity for the loss of the leg. *Close v. General Constr. Co.*, 61 Idaho 689, 106 P.2d 1007 (1940).

### **Medical Expense.**

While an order for the employer to furnish medical services and surgery required because of a compensable injury to a claimant who was engaged in full-time employment was proper, notwithstanding an old injury, consideration was required to be given to the old injury in determining what was a reasonable time for the employer's continuing to furnish such medical services and surgery. *Wilson v. Gardner Associated, Inc.*, 91 Idaho 496, 426 P.2d 567 (1967).

### **Physical Condition Prior to Injury.**

Although laborer may have had injury or preexisting physical weakness which reduced his ability to work below that of normal man, and was thereby more susceptible to injury, yet if he was able to do some work and in course of his employment was injured, he was entitled to compensation. In re *Larson*, 48 Idaho 136, 279 P. 1087 (1929).

Statute prescribed no standard of fitness, made no distinction between sound and unsound, which being true, compensation was not based on implied warranty of perfect health or immunity from latent or unknown tendencies to disease. In re *Larson*, 48 Idaho 136, 279 P. 1087 (1929).

Finding that aggravation of preexisting disease was not any different or of any greater extent than might have resulted from ordinary physical activity did not justify denial of compensation. *Hanson v. Independent Sch. Dist.* 11-J, 50 Idaho 81, 294 P. 513 (1930);



*Strouse v. Hercules Mining Co.*, 51 Idaho 7, 1 P.2d 203 (1931); *Scarborough v. Beardmore*, 52 Idaho 180, 12 P.2d 771 (1932); *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P.2d 728 (1938); *Nistad v. Winton Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938); *Young v. Herrington*, 61 Idaho 183, 99 P.2d 441 (1940); *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940); *Woodbury v. Frank B. Arata Fruit Co.*, 64 Idaho 227, 130 P.2d 870 (1942).

The fact that the employee's blood vessels were in a weakened condition as a result of disease would not prevent the award of compensation, if a strain, while working, resulted in a rupture of such vessels, thereby causing hemorrhage. *Fealka v. Federal Mining & Smelting Co.*, 53 Idaho 362, 24 P.2d 325 (1933).

A preexisting faulty condition of the heart of an employee, under the well-known rule so often reiterated by the Supreme Court of Idaho, would not defeat or prevent compensation, and this was particularly true where the testimony of all of the physicians testifying was reasonably clear, that the accidental injury had a deleterious effect upon a defective heart which perforce led to the conclusion that there was such causal connection as to entitle claimant to compensation. *Soran v. McKelvey*, 57 Idaho 483, 67 P.2d 906 (1937).

Evidence was sufficient to sustain a finding to the effect that claimant's condition was aggravated and made worse by reason of the

accident, the evidence showing that a miner suffered from sciatic rheumatism after a former injury, but after such injury, he worked at hard manual labor for a number of years until receiving the injury for which compensation was claimed. *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P.2d 728 (1938).

Nothing was contained in the Workmen's Compensation Law that limited its provisions to workmen who, previous to injury, were in sound condition and perfect health. *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957).

If liability was to stem from an increase of a preexisting injury or infirmity it had to be established by substantial evidence that an unexpected, untoward event or circumstance produced such exacerbation. *Beard v. Post Co.*, 82 Idaho 38, 348 P.2d 939 (1960).

Section providing deductions for preexisting injuries and infirmities was not applicable to a case where the applicant, prior to her injury, had an operation for removal of a protruding disc, from which she made a satisfactory recovery. *Arnold v. Splendid Bakery*, 88 Idaho 455, 401 P.2d 271 (1965).

Section providing deductions for preexisting injuries and infirmities had no application to a claim for loss of an eye by enucleation where the claimant had previously lost 90% of the vision of such eye but such loss of vision in no way contributed to the necessity for the enucleation of the eye. *Gentry v. Bano, Inc.*, 91 Idaho 790, 430 P.2d 681 (1967).

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 300 et seq.

**C.J.S.** — 100 C.J.S., Workers Compensation, § 550.

**72-407. Certain injuries deemed total and permanent.** — In case of the following injuries, if the employer disputes that the claimant is totally and permanently disabled, the burden of proof shall be on the employer to prove by clear and convincing evidence that the claimant is not permanently and totally disabled.

- (1) The total and permanent loss of sight in both eyes.
- (2) The loss of both feet at or above the ankle.
- (3) The loss of both hands at or above the wrist.
- (4) The loss of one (1) hand and one (1) foot.
- (5) An injury to the spine resulting in permanent and complete paralysis of both legs or arms or of one (1) leg and one (1) arm.
- (6) An injury to the skull resulting in incurable imbecility or insanity.

The above enumeration is not to be taken as exclusive. [I.C., § 72-407, as added by 1971, ch. 124, § 3, p. 422; am. 1997, ch. 274, § 5, p. 799.]

## JUDICIAL DECISIONS

**Cited in:** *Rhodes v. Sunshine Mining Co.*,  
113 Idaho 162, 742 P.2d 417 (1987).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

"Disability" defined.

Left hand — loss of use.

Loss of vision.

Medical attention.

Physical condition prior to injury.

Presumption rebuttable.

Test of disability.

Total disability.

**"Disability" Defined.**

Disability was based on loss of capacity to earn, measured by what a workman of the same class and grade could have earned in the employment in which he was injured under the conditions prevailing therein before and up to the time of the accident. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926); *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934); *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

**Left Hand — Loss of Use.**

Claimant, who was paid compensation by his employer for partial permanent disability as result of loss of use of right arm and hand in an industrial accident, was entitled to recover for total permanent disability from second injury fund due to prior loss of use of left hand. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

**Loss of Vision.**

A workman having lost the sight of both eyes was not ipso facto totally and permanently disabled. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

The Supreme Court ordered an award in favor of claimant for the amount of compensation to which he was entitled under the statutes in proceeding brought where total loss of vision had been sustained as a result of an accident arising out of and in the course of employment, the court holding the evidence did not sustain a finding that such workman was not totally and permanently disabled. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

The compensation of an employee who, prior to his injury, was totally blind in his right eye and had 20% vision in his left eye corrected to 85% with glasses and who was rendered totally blind by his injury was for permanent total disability with specific indemnity being paid by the employer for the loss of the sight of the left eye undiminished

by the fact that his vision in that eye uncorrected by glasses was only 20% prior to the injury and the balance being paid from the special indemnity fund. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931 (1968).

**Medical Attention.**

The need for medical attention was not incompatible with the status of total and permanent disability, and where necessary, medical treatment may have been provided for in awards for compensation for total and permanent disability. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

The four-year limitation period set forth in the statute did not apply to cases requiring medical attention and cases of total and permanent disability as defined in this section. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

**Physical Condition Prior to Injury.**

Nothing was contained in the Workmen's Compensation Law that limited its provisions to workmen who, previous to injury, were in sound condition and perfect health. *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957).

**Presumption Rebuttable.**

The provision that in the absence of conclusive proof to the contrary the disability scheduled herein should be deemed total and permanent was a rule of evidence. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

**Test of Disability.**

The wages earned by a claimant were not the ultimate test as to whether or not claimant was totally and permanently disabled; the ultimate test was ability to work at gainful employment. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

**Total Disability.**

The issue in total permanent disability cases was not whether claimant is able to

perform his former work, but whether he was able to work at gainful employment. *Griffin v. Potlatch Forests, Inc.*, 93 Idaho 174, 457 P.2d 413 (1969).

**72-408. Income benefits for total and partial disability.** — Income benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code, as follows:

(1) For a period not to exceed a period of fifty-two (52) weeks, an amount equal to sixty-seven per cent (67%) of his average weekly wage and thereafter an amount equal to sixty-seven per cent (67%) of the currently applicable average weekly state wage.

(2) Partial disability. For partial disability during the period of recovery an amount equal to sixty-seven per cent (67%) of his decrease in wage-earning capacity, but in no event to exceed the income benefits payable for total disability. [I.C., § 72-408, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 208, § 4, p. 1538; am. 1982, ch. 231, § 2, p. 608; am. 1991, ch. 207, § 1, p. 488.]

#### STATUTORY NOTES

**Cross References.** — Computation of wages, § 72-419.

Partial disability includes disfigurement, § 72-102.

Presumption that injury arose in course of employment where employee is killed or physically or mentally unable to testify, § 72-228.

#### JUDICIAL DECISIONS

##### ANALYSIS

Average weekly wage.  
Benefits although employed.  
Commission's findings.  
Constitutionality.  
Conversion reaction.  
Decrease in earning capacity.  
Effect of amendment of section.  
Odd-lot doctrine.  
Partial permanent disability.  
Period of recovery.  
Standing.  
Total disability.  
Total temporary disability.

##### Average Weekly Wage.

Pursuant to subdivision (1) of this section, the claimant was entitled to benefits equal to 60 percent of his average weekly wage for a period not exceeding 52 weeks, however, § 72-409(1) instructs that the benefits provided for in subdivision (1) of this section are subject to a maximum of 90 percent of the currently applicable average weekly state wage; therefore, where 60 percent of the claimant's average weekly wage was in excess of 90 percent of the currently applicable average weekly state wage, the claimant was only

entitled to benefits in the amount of 90 percent of the currently applicable average weekly state wage. *Nielson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984).

##### Benefits Although Employed.

Industrial Special Indemnity Fund (ISIF) was liable for payment of income benefits to worker even while worker was employed since the liabilities of employer and ISIF for the benefits provided under this section and I.C. § 72-428 were established by the deter-



mination of total permanent disability and the apportionment of the liability for this disability between them; once worker was determined to be totally permanently disabled, the fact that she was able to find some employment that provided her with income did not affect her right to receive the compensation to which she was entitled because of her disability. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

### **Commission's Findings.**

Pursuant to this section and § 72-409, the commission's determination of plaintiff's disability benefits required knowledge of her average weekly wage and, because the calculation of her average weekly wage was clearly part of the determination of her benefits, any findings by the commission that related to her average weekly wage were binding on the parties. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

### **Constitutionality.**

Because the amount of an employee's financial loss is dependent upon the employee's wages prior to his injury, it is reasonable for the legislature to consider the employee's average weekly wage in determining benefits under § 72-409 and this section; the difference in benefits between workers earning higher rates of pay and workers earning lower rates of pay is rationally related to the legislature's legitimate goal of compensating injured workers in proportion to their financial loss, therefore § 72-409 and this section do not violate the equal protection clause of the state or federal constitution. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

### **Conversion Reaction.**

Claimant was entitled to compensation for continuing treatment regarding a conversion reaction which resulted from an industrial accident. *Harrison v. Osco Drug, Inc.*, 116 Idaho 470, 776 P.2d 1189 (1989).

### **Decrease in Earning Capacity.**

Whether an individual is disabled is not determined by whether that person is under the care of a physician but by whether that person has suffered a decrease in wage-earning capacity. *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980).

### **Effect of Amendment of Section.**

Since the injury giving rise to claimant's right of compensation occurred before the effective date of 1991 amendment to this section, the Industrial Commission did not err in concluding that the former version of this section should have been used in calculating claimant's benefit rate even though

claimant was not determined to be totally disabled until after the effective date of the amendment. *Drake v. State, Indus. Special Indemnity Fund*, 128 Idaho 880, 920 P.2d 397 (1996).

### **Odd-Lot Doctrine.**

An examination of the policy behind the creation of the Industrial Special Indemnity Fund indicates that the employer's liability for permanent partial impairment should not increase, simply because a claimant is totally and permanently disabled through application of the odd-lot doctrine because of injuries unrelated to the industrial accident; accordingly, the escalator provision of subdivisions (1) or (2) of this section did not apply to the employer's share of liability in a case where the employee suffered a 50 percent partial disability due to his injury, but was found to be totally and permanently disabled under the odd-lot doctrine. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

### **Partial Permanent Disability.**

Once a claimant's condition is stabilized and his disability is rated, his benefits are calculated differently: If the disability is total, it is still computed by the "currently applicable average weekly state wage" of subdivisions (1) or (2) of this section, but if it is a partial permanent disability, it is calculated under § 72-428, which makes no reference to the "currently applicable" average weekly state wage of subdivisions (1) and (2) of this section. Hence, the legislature intended benefits for partial permanent disability to be fixed and quantifiable. Partial permanent disability benefits are not, nor are they intended to be, whole-life benefits. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

The decision of the Industrial Commission awarding the claimant a permanent partial impairment rating of two and one-half percent of the whole man and denying the claimant retraining was supported by the evidence where the substantial medical evidence indicated no positive objective orthopedic findings nor any neurologic abnormalities and other evidence indicated the claimant's ability to return to work at least in a related field, and that he would suffer no income loss as a result of the industrial accident. *Doyle v. Spangler Bros.*, 110 Idaho 757, 718 P.2d 1195 (1986).

### **Period of Recovery.**

This section entitled claimant to income benefits for total and partial disability during the period of recovery from a second surgery. *Reese v. V-1 Oil Co.*, 141 Idaho 630, 115 P.3d 721 (2005).

Where a worker was injured, he was entitled to so-called temporary income benefits

during the period of recovery, this section, but Idaho's worker's compensation statutes did not define the period of recovery, but it ended when the worker was medically stable, and the issue of maximum medical improvement was properly before the referee. *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005).

#### **Standing.**

Since plaintiff received less compensation under this section and § 72-409 than workers who earned higher wages prior to their injury, she had standing to bring a constitutional challenge to these statutes. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

#### **Total Disability.**

It is not necessary for a person to be physically unable to do anything worthy of compensation to be classified as totally disabled. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

#### **Total Temporary Disability.**

Where claimant testified as to statements made to him by his doctors indicating his physical impairment, but did not support his testimony with doctor's reports, depositions or a physician's oral testimony, his testimony did not constitute medical testimony which was necessary to support his claim for compensation; as a result, he failed to satisfy the burden required in order to establish his

eligibility for total temporary disability benefits. *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980).

Once a claimant establishes by medical evidence that he is still within the period of recovery from the original industrial accident, he is entitled to total temporary disability benefits unless and until evidence is presented that he has been medically released for light work and that (1) his former employer has made a reasonable and legitimate offer of employment to him which he is capable of performing under the terms of his light work release and which employment is likely to continue throughout his period of recovery, or that (2) there is employment available in the general labor market which the claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his light duty work release. *Malueg v. Pierson Enters.*, 111 Idaho 789, 727 P.2d 1217 (1986).

**Cited in:** *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Lopez v. Amalgamated Sugar Co.*, 107 Idaho 590, 691 P.2d 1205 (1984); *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987); *Ochoa v. State, Indus. Special Indem. Fund*, 118 Idaho 71, 794 P.2d 1127 (1990); *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 38 P.3d 617 (2001).

### **DECISIONS UNDER PRIOR LAW**

#### **ANALYSIS**

Average weekly wages.  
Compensable disability.  
Computation of amount.  
Construction.  
Death of employee.  
Disability ended.  
Effect of award.  
In general.  
Intermittent employment.  
Loss of vision.  
Pleading.  
Test of disability.  
Total disability.

#### **Average Weekly Wages.**

Since the legislature intended that the meaning of the term "average weekly wages" and the provisions for 36 times hourly rate or 4½ times the day rate as the basis of calculating amount of compensation were applicable to part-time employee, board's award of \$37.00 per week as compensation to the part-time employee who had average hourly income of \$2.75 was correct. *Nelson v. Bogus Basin Recreational Ass'n*, 94 Idaho 175, 484 P.2d 290 (1971).

#### **Compensable Disability.**

The compensation law spoke of terms of "disability for work," not in terms of disability in the medical sense; hence it was not error for the board to award temporary compensation and medical expenses for an industrial accident which tore open scarred tissue resultant from an old injury, even though the surgery performed would eventually have been required because of the old injury, where the claimant was engaged in full-time employment at the time of the accident. *Wilson v.*



Gardner Associated, Inc., 91 Idaho 496, 426 P.2d 567 (1967).

#### **Computation of Amount.**

The employee was not entitled to further compensation for total disability from an eye injury where it was made to appear that he had received compensation for more than 150 weeks. The rule with respect to partial disability was inapplicable. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Without evidence to show the average earnings of an employee over the preceding twelve month period before the accident, or a showing of what the average wages are of workmen of the same grade employed in the same class of employment, the industrial accident board had no authority to arbitrarily set a figure as the employee's average weekly wage and from that compute an award. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

Where question of partial temporary disability was raised after termination of total temporary disability, board should have determined loss of earning capacity even though there was no evidence as to the amount of compensation to which the claimant was entitled. *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

An employee who suffered loss of earnings due to temporary disability after termination of total temporary disability was entitled to compensation equal to 55% of difference of weekly wages earned before accident and wages he was able to earn afterward for the statutory period. *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

Rule upon which loss of capacity to earn was based was, what a workman of same class and grade could have earned in same employment in which he was engaged before and up to the time of accident. *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

Where claimant's injury was permanent, not temporary, as result of claimant's condition becoming static, authorizing an award for partial disability, no additional award could be made. *McCall v. Potlatch Forests, Inc.*, 69 Idaho 410, 208 P.2d 799 (1949).

#### **Construction.**

The industrial accident board had no authority to approve an agreement for compensation for a lesser amount than that prescribed by law, although it was in contemplation of the parties to such agreement to abate the amount fixed by law, in proportion to the disability that was the result of a preexisting and progressive disease of appendicitis. *Hanson v. Independent Sch. Dist.* 11-J, 57 Idaho 297, 65 P.2d 733 (1937).

#### **Death of Employee.**

One whose employment brought him within the scope and benefits of the law was

entitled to compensation for loss of earning capacity due to injury by accident arising out of, and in the course of, his employment, and one who was dependent upon such employee at the time of the accident, as provided for by statute, if the employee died as a result of the accident, was entitled to compensation for loss of support due to the death, but was not entitled to compensation for loss of earning capacity of the employee during his lifetime. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

An award based on disability for work, did not survive the death of the injured workman, and was distinguished from death benefits to dependents and specific indemnities or liquidated damages. *Mahoney v. Payette*, 64 Idaho 443, 133 P.2d 927 (1943).

#### **Disability Ended.**

Where an agreement showed it was the intention of the parties that when disability in fact actually ceased, then no further payments were required, this meant that when disability as a matter of fact ceased, payments should cease. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Where it was made to appear that by the use of corrective glasses the injured employee was able to perform ordinary work and labor and thereby earn the usual wages for such work, he was not entitled to further compensation. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

There was no statutory provision under the Workmen's Compensation Law requiring the employer or surety to bring an action or proceeding to establish nondisability. It was true that if the parties were not agreed that disability had in fact ceased, then it became a matter of fact to be determined by the industrial accident board. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Where employee after termination of total temporary disability started driving truck over mountains and subsequently completed training for sea duty he was not entitled to an award of \$12 per week from time of termination of disability for a period of 150 weeks from date of accident. *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

Where board made an award for partial permanent disability after termination of total temporary disability, claimant was not entitled to an additional award for partial temporary disability. *Blackburn v. Olson*, 69 Idaho 428, 207 P.2d 1160 (1949).

#### **Effect of Award.**

An award became a final adjudication and may have been changed thereafter, only because of changed conditions, and a wrong classification or an incorrect amount awarded could not be corrected or disturbed. *Barry v.*



Peterson Motor Co., 55 Idaho 702, 46 P.2d 77 (1935).

### In General.

Unlike certain other states, our workmen's compensation law contained no provision for rating a partial permanent disability in terms of specific indemnity comparable to a percentage of total permanent disability or on basis of "the whole man." *Hix v. Potlatch Forests, Inc.*, 88 Idaho 155, 397 P.2d 237 (1964).

### Intermittent Employment.

Employee having received compensation for more than 150 weeks was not entitled to compensation hereunder, but if disability, either total or partial, extended for 150 weeks, he was entitled to compensation for that full period, even though there was intermittent employment. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781 (1934).

Where the evidence showed that after the accident claimant worked in a mercantile store for a few days, but that he was unable to continue his work because of the pain, and aside from that work, he spent 16 days in a national guard encampment, but while there took no part in hard physical exercise or labor, this was sufficient to sustain a finding that by reason of the injury the employee was partially disabled for work for a period of 30 weeks from the date of the accident. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

### Loss of Vision.

The Supreme Court ordered an award in favor of claimant for the amount of compensation to which he was entitled under the statutes in proceeding brought where total loss of vision had been sustained as a result of an accident arising out of and in the course of employment, the court holding the evidence did not sustain a finding that such workman was not totally and permanently disabled. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

An employee who, prior to his injury was totally blind in his right eye and had 20% vision in his left eye corrected to 85% with glasses was, upon becoming wholly blind as the result of an industrial accident entitled to total disability benefits of \$45.00 a week for 400 weeks with 120 weeks at \$30.00 a week to be paid by the employer and the remainder from special indemnity fund, the employer's liability for loss of the sight of the left eye not being reduced by the fact that his vision prior to the accident, uncorrected by glasses was only 20%. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931 (1968).

### Pleading.

Where the evidence so warranted, it was not fatal error to fail to plead specifically

partial temporary disability. *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

### Test of Disability.

The wages earned by a claimant were not the ultimate test as to whether or not claimant was totally and permanently disabled; the ultimate test was ability to work at gainful employment. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

A workman having lost the sight of both eyes was not ipso facto totally and permanently disabled. *Crawford v. Nielson*, 78 Idaho 526, 307 P.2d 229 (1957).

### Total Disability.

Employee suffering injury not scheduled in the section providing specific indemnities for certain injuries, but temporarily totally disabled for work, was entitled to compensation. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781 (1934).

The statute applied to cases of total permanent disability and temporary total disability. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781 (1934).

The statute specifically provided that the employer, which of course included the surety, should pay compensation in the event of total disability during such disability, thus negating the idea that compensation should have been paid after disability as a fact actually ceased. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Where it appeared that at the time of the accident employee had dependents, but that at no time during the employee's disability, which occurred approximately four years later, did he have dependents within the meaning of the Workmen's Compensation Law, his compensation should in these circumstances have been fixed at the rate of \$12.00 a week. *McRae v. School Dist. No. 23*, 56 Idaho 384, 55 P.2d 724 (1936).

The statute had reference, specifically, to cases of total disability from injury incurred by accident, arising out of and in the course of claimant's employment, and fixed the amount of compensation and the period during which it should be paid. *McRae v. School Dist. No. 23*, 56 Idaho 384, 55 P.2d 724 (1936).

Board in deducting from award for total permanent disability, period of 400 weeks previously awarded, correctly made the award period and not the pay period the criterion in making the deduction. *Endicott v. Potlatch Forests, Inc.*, 69 Idaho 450, 208 P.2d 803 (1949).

Where the statute provided that in case of specified injuries, the compensation should be 55 per cent of the average weekly wages, but not more than the weekly compensation, in addition to all other compensation, the clause in addition to all other compensation meant

but one permanent award in addition to temporary compensation accruing prior to the time claimant's condition became sufficiently

static for board to make a final award. *McCall v. Potlatch Forests, Inc.*, 69 Idaho 410, 208 P.2d 799 (1949).

**72-409. Maximum and minimum income benefits for total disability.** — (1) The weekly income benefits provided for in section 72-408(1), Idaho Code, shall be subject to a maximum of ninety percent (90%) and a minimum of forty-five percent (45%) of the currently applicable average weekly state wage, provided, however, that during the first fifty-two (52) weeks of total disability income benefits shall not in any case exceed ninety percent (90%) of the employee's average weekly wage, but if during the first fifty-two (52) weeks ninety percent (90%) of the employee's average weekly wage is less than fifteen percent (15%) of the currently applicable average weekly state wage, then the employee shall receive no less than fifteen percent (15%) of the currently applicable average weekly state wage, except as benefits may be increased by reason of increases in the average weekly state wage as computed in subsection (2) hereof, nor shall income benefits paid subsequent to the first fifty-two (52) weeks of total disability exceed income benefits paid during the first fifty-two (52) weeks of total disability except as the same may be increased by reason of increases in the average weekly state wage, provided, however, that where an employee's benefit rate for the first fifty-two (52) week period was less than the minimums prescribed above, his benefit rate thereafter shall be not less than forty-five percent (45%) of the currently applicable average weekly state wage.

(2) For the purpose of this law the average weekly wage in the state shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve (12). The average annual wage thus obtained shall be divided by fifty-two (52) and the average weekly state wage thus determined rounded to the nearest dollar. The average weekly state wage as so determined shall be applicable for the calendar year commencing January 1 following the June 1 determination. [I.C., § 72-409, as added by 1971, ch. 124, § 3, p. 422; am. 1981, ch. 261, § 3, p. 552; am. 1991, ch. 207, § 2, p. 488; am. 1998, ch. 210, § 1, p. 737.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 2 of S.L. 1998, ch. 210 declared an emergency. Approved March 20, 1998.

#### JUDICIAL DECISIONS

##### ANALYSIS

Commission's findings.

Constitutionality.

Escalator provision.

Limitation on maximum benefits.

Standing.



### Commission's Findings.

Pursuant to this section and § 72-408, the commission's determination of plaintiff's disability benefits required knowledge of her average weekly wage and, because the calculation of her average weekly wage was clearly part of the determination of her benefits, any findings by the commission that relate to her average weekly wage were binding on the parties. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

### Constitutionality.

Because the amount of an employee's financial loss is dependent upon the employee's wages prior to his injury, it is reasonable for the legislature to consider the employee's average weekly wage in determining benefits under § 72-408 and this section; the difference in benefits between workers earning higher rates of pay and workers earning lower rates of pay is rationally related to the legislature's legitimate goal of compensating injured workers in proportion to their financial loss, therefore § 72-408 and this section do not violate the equal protection clause of the state or federal constitution. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

### Escalator Provision.

The escalator provision in this section becomes effective for an individual claimant immediately following the end of his initial 52 week period of disability, and the average weekly state wage in effect at that time shall be utilized for computation of a claimant's compensation benefits. *Ochoa v. State, Indus. Special Indem. Fund*, 118 Idaho 71, 794 P.2d 1127 (1990).

As the workers' compensation death benefits statute existed in 1985, benefits were fixed and quantifiable, and did not allow for annual adjustments in the weekly state wage. *Vincent v. Dynatec Mining Corp.*, 132 Idaho 200, 969 P.2d 249 (1998).

### Limitation on Maximum Benefits.

Pursuant to § 72-408(1), the claimant was entitled to benefits equal to 60 percent of his average weekly wage for a period not exceeding 52 weeks; however, subsection (1) of this section instructs that the benefits provided for in § 72-408(1) are subject to a maximum of 90 percent of the currently applicable average weekly state wage. Therefore, where 60 percent of the claimant's average weekly wage was in excess of 90 percent of the currently applicable average weekly state wage, the claimant was only entitled to benefits in the amount of 90 percent of the currently applicable average weekly state wage. *Nielson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984).

### Standing.

Since plaintiff received less compensation under this section and § 72-408 than workers who earned higher wages prior to their injury, she had standing to bring a constitutional challenge to these statutes. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

**Cited in:** *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983); *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984); *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987).

**72-410. Dependents.** — The following persons, and they only, shall be deemed dependents and entitled to income benefits under the provisions of this act:

(1) A child:

(a) Under eighteen (18) years of age, or incapable of self-support and unmarried, whether or not actually dependent upon the deceased employee;

(b) Under twenty-three (23) years of age if a full-time student and as provided for in section 72-412(3), Idaho Code.

(2) The widow or widower only if living with the deceased or living apart from the deceased for justifiable cause, or actually dependent, wholly or partially, upon the deceased.

(3) A parent or grandparent only if actually dependent, wholly or partially, upon the deceased.

(4) A grandchild, brother or sister only if under eighteen (18) years of age, or incapable of self-support, and actually dependent wholly upon the deceased. [I.C., § 72-410, as added by 1971, ch. 124, § 3, p. 422; am. 1975,



ch. 13, § 2, p. 18; am. 1989, ch. 194, § 1, p. 489; am. 2006, ch. 186, § 1, p. 586.]

### STATUTORY NOTES

**Cross References.** — Time of dependency, §§ 72-401, 72-411, 72-440.

**Amendments.** — The 2006 amendment, by ch. 186, deleted “if under eighteen (18) years of age, or incapable of self-support and unmarried, whether or not actually dependent upon the deceased or disabled employee” from the end of the introductory paragraph in

subsection (1) and added subsections (1)(a) and (b).

**Compiler’s Notes.** — The words “this act” refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 3 of S. L. 1975, ch. 13 declared an emergency. Approved February 28, 1975.

### JUDICIAL DECISIONS

#### ANALYSIS

Actually dependent.  
— Evidence.

#### Actually Dependent.

The workmen’s compensation law addresses dependency not in terms of “legal” dependency but rather “actual” dependency; accordingly, “actually dependent” as used in subsection (4) of this section means dependent in fact, not dependent by law. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983).

#### — Evidence.

Where the evidence presented showed that the workmen’s compensation claimant was

wholly dependent on her deceased son for support as of the date of his death and that the claimant was not receiving food stamps or any other type of support from state or federal agencies, the evidence supported the commission’s finding that the claimant was entitled to benefits as an actual dependent of her deceased son, notwithstanding the fact that the son was killed on only his third day of work and had not yet received a single paycheck from his employer. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Children.  
Construction.  
Dependency question of fact.  
Marital status — sufficiency.  
Parents.

#### Children.

An agreement of the employer and his surety to pay a child compensation, after being approved by the board, had the same effect as an award. It was not subject to review on appeal on the grounds of a change in conditions, alleging that the child was of illegitimate birth, in the absence of fraud in the inception of the agreement. *Rodius v. Coeur d’Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

Where a report of a school district fixed the compensation of the janitor’s wife at \$35.00 per month “plus room, heat, and light,” she was receiving more than the minimum wage essential to an award of \$6.00 per week, and the evidence of the work actually performed by the janitor’s wife, and the wages paid by

the school district, coupled with such statement of the school board, justified the award of \$6.00 per week to a minor child by the industrial accident board. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

Where an employee, after marriage to the mother of children by prior marriage, assumed the responsibility of a father to the children, and they were known and called by the employee’s name at his request, they were his “dependents” at the time of his injury and death within the meaning of the compensation act. *Nicholas v. Idaho Power Co.*, 63 Idaho 675, 125 P.2d 321 (1942).

Stepchildren of deceased employee were properly included in award along with wife of employee though father of stepchildren was

required to pay \$100 per month for their support and children were living with their father at time of employee's death. *Sanders v. Ray*, 67 Idaho 200, 174 P.2d 836 (1946).

For the purpose of death benefits, the statute defined dependents as including a child if under 18 years of age or incapable of self-support and unmarried, whether actually dependent upon the deceased or not, which relationship must have existed at the time of the accident. In *re Jones*, 84 Idaho 327, 372 P.2d 406 (1962).

Minor children were entitled to payment of workmen's compensation benefits growing out of the death of their father in covered employment even if the children had been legally adopted by a married couple. In *re Jones*, 84 Idaho 327, 372 P.2d 406 (1962).

A child was deemed dependent whether actually dependent upon the decedent parent or not. In *re Jones*, 84 Idaho 327, 372 P.2d 406 (1962).

### Construction.

The statute was confined to death benefits. *McRae v. School Dist. No. 23*, 56 Idaho 384, 55 P.2d 724 (1936).

The legislature having full power to determine the classes to whom compensation should have been paid, the correction of any hardship resulting therefrom should have been addressed to that body. *Sanders v. Ray*, 67 Idaho 200, 174 P.2d 836 (1946).

The rule of liberal construction in favor of dependents was particularly applicable under the Workmen's Compensation Law. *Sanders v. Ray*, 67 Idaho 200, 174 P.2d 836 (1946).

### Dependency Question of Fact.

What constituted actual dependency was a question of fact and each case must have rested and been decided upon its own particular facts and circumstances. In *re Konin*, 69 Idaho 28, 202 P.2d 239 (1949).

The legal obligation to support, standing alone, would not establish actual dependency. In *re Konin*, 69 Idaho 28, 202 P.2d 239 (1949).

In determining whether widow who had been separated from her husband for three years at the time of his death was wholly or partially dependent, the test should not be whether the claimant could have existed without the aid he supplied but rather whether the assistance given by decedent was substantial and whether it enabled his family to enjoy a better life than they could have without such help and assistance. In *re Haynes*, 95 Idaho 492, 511 P.2d 309 (1973).

Where claimant and decedent had been separated three years prior to decedent's death, evidence that claimant used decedent's credit card to purchase gas, that decedent had made four or five car payments on claimant's car, had paid claimant's auto insurance for a portion of the time after their separation, had

paid various medical bills for claimant and their daughter and had sent cash to claimant on numerous occasions when she so requested was sufficient to show that decedent had given substantial assistance to claimant during their separation thereby entitling her to benefits. In *re Haynes*, 95 Idaho 492, 511 P.2d 309 (1973).

### Marital Status — Sufficiency.

Where an application for compensation for the death of a husband stated that the claimant bore the relationship of spouse to the deceased and was actually and wholly dependent upon him for support on the day of the accident, and the answer of the employer admitted this paragraph, but thereafter filed an amendment and alleged that "The claimant Lillian R. Bocock is not a dependent widow under the purview of the Workmen's Compensation Act of Idaho," this was not the equivalent of an allegation that she was neither dependent on her husband nor living with him at the time of the accident, and was insufficient to defeat her right to compensation upon that issue. *Bocock v. State Bd. of Educ.*, 55 Idaho 18, 37 P.2d 232 (1934).

Although the husband, during his lifetime, did not contribute much to the support of his wife and family, but did make some small contributions, and they temporarily lived at different places, in order to obtain lodging and the necessities of life, it did not render the wife and children any the less the dependents of the husband. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

In a case where a claimant asserted that she was married to deceased employee, her prior marriage was not material on the question of whether she was the widow of the deceased. *Mauldin v. Sunshine Mining Co.*, 61 Idaho 9, 97 P.2d 608 (1939).

Evidence was sufficient to establish a marriage between deceased and claimant for compensation, since the law will presume morality, and not immorality, marriage, and not concubinage, legitimacy, and not bastardy: when a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proof, the law comes to its aid with a strong presumption of its legality, casting the burden of proof upon the party objecting and requiring him in every particular to make plain against the constant pressure of such presumption, the truth of law and fact that the marriage is illegal. *Mauldin v. Sunshine Mining Co.*, 61 Idaho 9, 97 P.2d 608 (1939).

Mere proof that the husband made his appearance in his wife's divorce action, that no divorce was ever granted in that action, and that the action was dismissed did not prove that the husband was alive or undivorced from his wife at the time of her subsequent marriage to another, and did not



preclude the wife's recovery of compensation under the compensation act for the death of the second husband. *Nicholas v. Idaho Power Co.*, 63 Idaho 675, 125 P.2d 321 (1942).

Where a husband entered into consent marriage at a time when his first wife was still living, and continued in such second marital relation, and he and the second wife conducted themselves as husband and wife after the divorce decree from the first wife had become final, and in application for employment the husband named the second wife as his wife, such second wife was the husband's "widow" on his death, and entitled to workmen's compensation. *Morrison v. Sunshine Mining Co.*, 64 Idaho 6, 127 P.2d 766 (1942).

Claimant wife could not recover unless "actually dependent" either wholly or in part, upon the deceased husband at time of accident resulting in death; since it was undisputed that they had not lived together for a number of years, prior to his death, the burden of proof was upon such claimant to establish actual dependency. *In re Konin*, 69 Idaho 28, 202 P.2d 239 (1949).

Evidence showing claimant widow had not been supported by decedent during the short time they lived together nor after their separation, and showing that she neither expected nor anticipated receipt of financial assistance from decedent or that by his death she lost anything she was receiving or might have received, justified the board in finding that claimant was not actually dependent upon decedent at time of his death. *In re Konin*, 69 Idaho 28, 202 P.2d 239 (1949).

The statute which provided that a judgment of nullity of a marriage rendered was conclusive only as against the parties thereto or claiming under them, could not be invoked to prevent a wife of a deceased first husband from obtaining benefit rights after a second marriage was annulled because the second husband had an undivorced wife at the time of marriage. *Duncan v. Jacobsen Constr. Co.*, 83 Idaho 254, 360 P.2d 987 (1961).

Section defining dependents and providing for entitlement to compensation clearly contemplated a valid and subsisting marriage adjudicated as void ab initio. *Duncan v. Jacobsen Constr. Co.*, 83 Idaho 254, 360 P.2d 987 (1961).

#### Parents.

A mother had to show dependency upon a son by competent evidence, to establish a claim for compensation. *Ybaibarriaga v. Farmer*, 39 Idaho 361, 228 P. 227 (1924).

Where there was a mother having a number of sons all of whom lived on a farm except one, and he worked and contributed to her support, she was dependent. *Gloubitz v. Smeed Bros.*, 53 Idaho 7, 21 P.2d 78 (1933).

Where the evidence showed that a deceased employee helped his parents build a barn on their ranch, painted it, installed complete plumbing fixtures in the house, built a septic tank, and drainage system, painted the house, built a woodshed, maintained a water-pumping system, serviced the engine, purchased and cared for a cream separator, worked upon the ranch, and made voluntary contributions to assist them, helped pay for the ranch, performed labor in planting and harvesting the crops, helped purchase a horse and a binder and other farm equipment, and employed a man to take his place upon the ranch and paid him his wages, it was sufficient to sustain an award to the parents upon the theory that they were partially dependent upon him. *Miller v. G.L. Arnett & Son*, 58 Idaho 420, 74 P.2d 177 (1937).

Where the evidence showed that the employee had helped on his father's farm and later on contributed money from his earnings, which was necessary to the support of the father, this was sufficient to establish the father's dependency, and this was true notwithstanding the fact that there was no note of such dependency on the employee's identification card. *Chambers v. State ex rel. Parsons*, 59 Idaho 200, 81 P.2d 748 (1938).

It was not necessary in order to establish that a parent or grandparent was dependent upon the deceased employee, to prove a contractual obligation on the part of the employee to that effect. *Chambers v. State ex rel. Parsons*, 59 Idaho 200, 81 P.2d 748 (1938).

A mother who was wholly dependent upon her son was entitled to compensation for his death, when his employment was within the scope and benefits of the Workmen's Compensation Law and his death was the result of an accident within the course of his employment. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

In order for a parent to be awarded compensation, there had to be evidence of at least partial dependency of such parent upon the deceased employee. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

Parents received compensation only if dependent on the child injured or killed. *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969).

#### RESEARCH REFERENCES

**A.L.R.** — Posthumous children and children born after accident as dependents. 18 A.L.R.3d 900.

Discrimination on basis of illegitimacy as denial of constitutional rights. 38 A.L.R.3d 613.



**72-411. Time of dependency.** — The relation of dependency must exist at the time of the accident causing the injury or manifestation of occupational disease. [I.C., § 72-411, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — Dependency, time of, death benefits from occupational disease, § 72-440.

Dependency, when determined, § 72-401.

#### JUDICIAL DECISIONS

**Cited in:** Harmon v. Lute's Constr. Co., 112 Idaho 291, 732 P.2d 260 (1986).

**72-412. Periods of income benefits for death.** — The income benefits for death herein provided for shall be payable during the following periods:

(1) To a widow or widower, until death or remarriage, but in no case to exceed five hundred (500) weeks.

(2) Unless as otherwise provided in subsection (3) of this section, to or for a child, until eighteen (18) years of age, and if incapable of self-support after age eighteen (18) years for an additional period not to exceed five hundred (500) weeks, deducting the period benefits which were paid prior to eighteen (18) years of age. Provided, income benefits payable to or for any child shall cease when such child marries.

(3) To or for a child after age eighteen (18) years who is enrolled as a full-time student in any accredited educational institution, or accredited vocational training program, until such child ceases to be so enrolled or reaches the age of twenty-three (23) years, whichever occurs first. Provided, in the event the child reaches the age of twenty-three (23) years during the quarter or semester in which the child is enrolled, benefits shall continue until the completion of the quarter or semester in which the child reached the age of twenty-three (23) years. This extension of benefits to the age of twenty-three (23) years shall not apply if the accident causing the injury or manifestation of the occupational disease occurred prior to December 31, 2006.

(4) To a parent or grandparent, during the continuation of a condition of actual dependency, but in no case to exceed five hundred (500) weeks.

(5) To or for a grandchild, brother or sister, during dependency as hereinbefore defined, but in no case to exceed five hundred (500) weeks.

(6) In case death occurs after a period of disability, either total or partial, the period of disability shall be deducted from the total periods of compensation respectively stated in this section. [I.C., § 72-412, as added by 1971, ch. 124, § 3, p. 422; am. 1981, ch. 261, § 4, p. 552; am. 2002, ch. 129, § 1, p. 359; am. 2006, ch. 186, § 2, p. 586.]

#### STATUTORY NOTES

**Cross References.** — Determination of wages, § 72-419.

**Amendments.** — The 2006 amendment,

by ch. 186, in subsection (2), added "Unless as otherwise provided in subsection (3) of this section" to the beginning; added present sub-

section (3); and redesignated former subsections (3) to (5) as (4) to (6).

## JUDICIAL DECISIONS

**Cited in:** *In re Reichert*, 95 Idaho 647, 516 P.2d 704 (1973).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Computation of wages.

Death after award.

Present value of future liability.

#### Computation of Wages.

Where a report of a school district fixed the compensation of the janitor's wife at \$35.00 per month "plus room, heat, and light," she was receiving more than the minimum wage essential to an award of \$6.00 per week, and the evidence of the work actually performed by the janitor's wife, and the wages paid by the school district, coupled with such statement of the school board, justified the award of \$6.00 per week to a minor child by the industrial accident board. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

Where the wife of deceased employee testified that she kept an account of her husband's earnings, and that he gave her his checks and had earned \$663.60 from March until August for the work he did for different employers; and gave testimony as to the amount decedent received each day; testifying that he received 40 cents per hour from the employer whom decedent was working for at time of death, and this was corroborated by another; such evidence was sufficient to sustain an award for the minimum amount. *In re Black*, 58 Idaho 803, 80 P.2d 24 (1938), overruled on other grounds, *Hite v. Kulhenak Bldg. Contractors*, 96 Idaho 70, 524 P.2d 531 (1974).

#### Death after Award.

An employee died from an injury due to an accident in the course of his employment. His

widow was granted an award payable over a period of 400 weeks. She died about two years after the award was made. It was held that her administrator was entitled to the balance remaining unpaid at her death. *State Ins. Fund v. Hunt*, 52 Idaho 639, 17 P.2d 354 (1932).

Where an employee was injured and thereafter died, but after the injury or before his death he received compensation, and he left no dependents, then the amount of compensation paid him in the interim between the injury and death was to be deducted from the \$1000 due the state. *State ex rel. Wright v. Potlatch Forests, Inc.*, 60 Idaho 797, 97 P.2d 394 (1939).

#### Present Value of Future Liability.

Where the commission was instructed to determine, or have the parties stipulate, how much the present value of the claimants' future compensation should have been discounted in consideration of the contingency that the claimants might die or marry at some point during the remainder of the nine and one-half year payment period, the total amount of the benefit to be paid out over about nine and one-half years should not only have been discounted to its present value, it also should have been discounted based on the contingent nature of those claimants' rights to receive those benefits. *Cameron v. Minidoka County Hwy. Dist.*, 125 Idaho 801, 874 P.2d 1108 (1994).

**72-413. Income benefits for death.** — If death results from the accident or occupational disease within four (4) years from the date of the accident, or manifestation of the occupational disease, the employer shall pay to or for the benefit of the following particular classes of dependents' weekly income benefits equal to the following percentages of the average weekly state wage as defined in section 72-409, Idaho Code. The benefits payable hereunder shall be subject to annual adjustment as provided in section 72-409(2), Idaho Code. The annual adjustment provided herein shall not apply to benefits for an injury or occupational disease resulting in death



if the accident causing the injury or the manifestation of the occupational disease occurred prior to July 1, 1991.

(1) To a dependent widow or widower, if there be no dependent children, forty-five per cent (45%).

(2) To a dependent widow or widower, if there be dependent children, an additional five per cent (5%) of the average weekly state wage for each dependent child to and including a total of three (3). Such compensation to the widow or widower shall be for the use and benefit of the widow or widower and of the dependent children and the commission may from time to time apportion such compensation between them in such a way as it deems best.

(3) If there be no dependent widow or widower, but a dependent child or children, thirty per cent (30%) of the average weekly state wage for one (1) child and ten per cent (10%) for each additional child to and including a total of three (3), to a maximum not to exceed sixty per cent (60%) of the average weekly state wage, to be divided equally among such children.

(4) To the parents, if one (1) be wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, twenty-five per cent (25%) of the average weekly state wage; if both are wholly dependent, twenty per cent (20%) of the average weekly state wage to each; if one (1) be or both are partly dependent, a proportionate amount in the discretion of the commission.

The above percentages shall be paid if there be no dependent widow, widower or child. If there be a widow, widower or child, there shall be paid so much of the above percentages as, when added to the total percentage payable to the widow, widower and children, will not exceed a total of sixty per cent (60%) of the average state weekly wage.

(5) To the brothers, sisters, grandparents and grandchildren, if one (1) be wholly dependent upon the deceased employee at the time of his death, twenty per cent (20%) of the average state weekly wage to such dependents; if more than one be wholly dependent, thirty per cent (30%) of the average state weekly wage, divided among such dependents, share and share alike. If there be no one (1) of them wholly dependent, but one (1) or more partially dependent, ten per cent (10%) of the average state weekly wage divided among such dependents, share and share alike.

The above percentages shall be paid if there be no dependent widow, widower, child or parent. If there be a dependent widow, widower, child or parent, there shall be paid so much of the above percentages as, when added to the total percentages payable to the widow, widower, children and dependent parents, will not exceed a total of sixty per cent (60%) of the average weekly state wage.

Payments made for and on behalf of a dependent child or children shall be made to such child's or children's natural or adoptive surviving parent for the use and benefit of the child or children, if such child or children reside with such parent, notwithstanding the remarriage of such parent; provided, however, if the care and the custody of such child or children has been awarded by a court of competent jurisdiction of this state or any other state to a person or persons other than the child's or children's natural or adoptive



parent, then such payments shall be made to that person or those persons so awarded care and custody for the use and benefit of the child or children. Whenever the commission deems it necessary, it may direct any payments made hereunder to be made under such terms and conditions as it deems necessary. [I.C., § 72-413, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 30, § 1, p. 981; am. 1991, ch. 207, § 3, p. 488; am. 1997, ch. 274, § 6, p. 799.]

### STATUTORY NOTES

**Cross References.** — No limitations as to minor or insane not under guardianship, § 72-705.

**Effective Dates.** — Section 2 of S. L. 1974, ch. 30 declared an emergency. Approved February 27, 1974.

### JUDICIAL DECISIONS

#### ANALYSIS

Annual adjustments.  
Constitutionality.  
Dependency.

#### Annual Adjustments.

As the workers' compensation death benefits statute existed in 1985, benefits were fixed and quantifiable, and did not allow for annual adjustments in the weekly state wage. *Vincent v. Dynatec Mining Corp.*, 132 Idaho 200, 969 P.2d 249 (1998).

#### Constitutionality.

Because the intent of the statutes is to provide for loss of monetary support, it is both rational and reasonable for the legislature to limit benefits to those individuals who were truly dependent on the deceased worker. Therefore, by leaving independent adult children of deceased workers benefitless, this section did not violate the equal protection

clauses of the state and federal constitutions. *Meisner v. Potlatch Corp.*, 131 Idaho 258, 954 P.2d 676 (1998), cert. denied, 525 U.S. 818, 119 S. Ct. 56, 142 L. Ed. 2d 44 (1998).

#### Dependency.

The workmen's compensation law addresses dependency not in terms of "legal" dependency but rather "actual" dependency; accordingly, "actually dependent" as used in § 72-410(4) means dependent in fact, not dependent by law. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983).

**Cited in:** *In re Reichert*, 95 Idaho 647, 516 P.2d 704 (1972); *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Aggravation of preexisting condition.  
Burden of proof.  
Cause of death.  
Children.  
Claim of state — rights in general.  
Classification of benefits.  
Death after award.  
Parents.  
Scope of section.

#### Aggravation of Preexisting Condition.

Death resulting concurrently from injury by an accident and a preexisting disease entitled dependents to death benefits. *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929); *In re Soran*, 57 Idaho 483, 67 P.2d 906 (1937); *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943); *Bishop v. Morrison-Knudsen Co.*, 64 Idaho

806, 137 P.2d 963 (1943).

The fact that an employee had a heart condition, prior to his injury, would not defeat the right to compensation for his death through aggravation of the heart condition, by a back injury sustained while employed. *Soran v. McKelvey*, 57 Idaho 483, 67 P.2d 906 (1937).

The evidence warranted a denial of compensation where there was no evidence to show that the employee died of an injury arising out of or occurring in the course of his employment and there was evidence that he died of coronary thrombosis. *Wade v. Pacific Coast Elevator Co.*, 64 Idaho 176, 129 P.2d 894 (1942).

Death from coronary thrombosis or occlusion caused by over-exertion resulting from accident was compensable, notwithstanding heart ailment predisposing to occlusion. In *re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

On conflicting evidence, board found carcinomatosis, not aggravated or accelerated by traumatic injuries, was cause of death. Denial of award was sustained. *Madariaga v. Delamar Milling Corp.*, 64 Idaho 660, 135 P.2d 438 (1943).

Death benefits were not subject to abatement or deduction on account of the contribution or concurrence of preexisting disease, as disability under former § 72-323. *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

A finding that death resulted from injury from accidental fall of workman with preexisting disease, augmented by hard work afterwards was sustained. While "hard work" was not an "accident" or an "injury," it might augment or accelerate the injurious results of an accident. *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

Compensation was recoverable where employee's work caused an accident which aggravated or accelerated a previous diseased condition of the worker, causing death. *Teater v. Dairymen's Co-op. Creamery*, 68 Idaho 152, 190 P.2d 687 (1948).

### **Burden of Proof.**

The burden was on claimant to show by preponderance of evidence that death resulted from accident arising out of and in the course of his employment. *Parkison v. Anaconda Copper Mining Co.*, 56 Idaho 610, 57 P.2d 1216 (1936); *Madariaga v. Delamar Milling Corp.*, 64 Idaho 660, 135 P.2d 438 (1943); *Cameron v. Bradley Mining Co.*, 66 Idaho 409, 160 P.2d 461 (1945).

Claimant had the burden of establishing the probable cause of death of the employee. *Stralovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948).

The claimant had to prove an industrial injury caused by accident arising out of and in the course of the employment, and in the event of death that death resulted from injury sustained. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

### **Cause of Death.**

Where a workman was bitten by a wood tick, at a time while he was employed, and death resulted, his dependents were entitled

to compensation. *Nelson v. Tesemini Timber Protective Ass'n*, 59 Idaho 529, 84 P.2d 566 (1938).

Driver suffering brain injury and mentally deranged as result of overturning of truck was killed by self-inflicted or accidental gun shot. It was held that the after effect of compensable injury was proximate cause of death. *Brink v. H. Earl Clack Co.*, 60 Idaho 730, 96 P.2d 500 (1939).

Where board erroneously computed death benefits, award was sustained but case was remanded with direction to compute benefits under the statute making last employer liable. *Goasland v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

Injured workman under treatment for compensable injury with arm in plaster cast was precipitated into water from capsized boat on a fishing trip. It was held that capsizing of boat, not the initial injury, was proximate cause of death. *Linder v. Payette*, 64 Idaho 656, 135 P.2d 440 (1943).

Cause of death was a question of fact for board's determination. *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

Where death followed soon after an injury to an able-bodied man, there arose a presumption or natural inference that the death was caused by the injury, in the absence of believed contrary testimony, and even though the only doctor who testified stated that there was no causal relation, an award to a claimant had to stand, as the doctor may have been disbelieved and causal relation inferred from the rest of the evidence. *Stralovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948).

Sudden death of able-bodied employee while doing light work in normal course of his employment was not compensable where board made no finding as to cause of death, since sudden death in itself was not an accident. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

### **Children.**

Where guardian and ward were both non-residents of Idaho, and guardian had not complied with statutes authorizing him to remove ward's property from state and giving guardian authority to receive said property or sue for same in his own name, such guardian could not lawfully enter into contract fixing compensation, and receive thereunder moneys awarded by industrial accident board. In *re Bones*, 48 Idaho 85, 280 P. 223 (1929).

Where a janitor and his wife both worked for a school district, and the wife was killed, a minor child was entitled to the minimum award of \$6.00 per week for the death of its mother. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).



Widow's death or remarriage did not affect or impair the right of minors to receive compensation for the full period prescribed by statute. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

If the mother of minor children neglected to make application for compensation where the father of the children had been killed, or even allowed the statute of limitations to run against her claim, the minors would still have had a right to petition for an award. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

Where an employee was killed and his dependent wife and children were nonresidents of the state of Idaho, the widow may have prosecuted the claim for and on behalf of herself and the nonresident minor children, and it was not necessary, in order to recover compensation, that such minors be represented by a guardian or a guardian ad litem. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

The compensation act contemplated the award to the mother for herself and minor children, which, in the sound discretion of the industrial accident board, might all be paid to the widow and mother or be segregated, part to the mother and part to the children. In case of an award to the mother for herself and children, she might have collected it as it fell due, and the employer and insurance carrier were discharged pro tanto as each payment was made, but in case of separate awards, a guardian had to be appointed or designated to collect and disburse the minors' share of the award. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

The minor children always had an interest in the award, such as would at any time give them a legal standing before the industrial accident board; it was the duty of the courts to protect their interest in the compensation, and if an award were made to the mother for their benefit, and it should appear later that she was dissipating the fund and not using any of it for their benefit, and was neglecting them, the minors would have an undoubted right to petition the board for an order directing their share of the compensation to be paid to a guardian for their use and benefit. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938).

Service of notice of appeal by employer on widow and her attorney was sufficient notice to minor children of deceased employee and widow, since widow was authorized representative of the children. *Mahon v. Pocatello*, 75 Idaho 166, 269 P.2d 1075 (1954).

Minor children were entitled to payment of workmen's compensation benefits growing out of the death of their father in covered employment even if the children had been legally adopted by a married couple. In re *Jones*, 84 Idaho 327, 372 P.2d 406 (1962).

### **Claim of State — Rights in General.**

In the case of death, where there were no dependents within the meaning of the law, the state, as the sovereign or *parens patriae*, asserted the right to recover for such death. *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969).

### **Classification of Benefits.**

Where the wife of a janitor of a school district, who assisted him, was killed, it was proper to award funeral expenses. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

A workman died as a result of being bitten by ticks. The administrator of his estate was entitled to expenses of medical attendance, hospital services and funeral expenses. If he left no dependents the state was entitled to an award payable to the state insurance fund. *Long v. State Ins. Fund*, 60 Idaho 257, 90 P.2d 973 (1939).

There were three classes of compensation in case of death: (1) Personal compensation to employee or his dependents, or where there were none, to the state; (2) hospital and medical expenses; (3) burial expenses. *State ex rel. Wright v. C.C. Anderson Co.*, 65 Idaho 400, 145 P.2d 237 (1944).

In the event of death of an employee arising out of and in the course of his employment, there were three general classes of benefits designated as compensation, to-wit: Payment of personal compensation to the employee and his dependents; payment of hospital, medical and burial expenses; and when there were no dependents, payment of a lump sum to the state. *Gifford v. Nottingham*, 68 Idaho 330, 193 P.2d 831 (1948).

### **Death after Award.**

Where an employee was injured and thereafter died, but after the injury or before his death he received compensation, and he left no dependents, then the amount of compensation paid him in the interim between the injury and death would be deducted from the \$1000 due the state. *State ex rel. Wright v. Potlatch Forests, Inc.*, 60 Idaho 797, 97 P.2d 394 (1939).

The right for compensation for specific indemnity for an injury survived the death of the employee from other reasons, because it was "liquidated damages" inuring to the benefit of the employee and became a part of his estate. *Mahoney v. Payette*, 64 Idaho 443, 133 P.2d 927 (1943).

Compensation payments to injured workman before death were deductible from death benefits of dependents and of state. *State ex rel. Wright v. C.C. Anderson Co.*, 65 Idaho 400, 145 P.2d 237 (1944).

### **Parents.**

It was not a sufficient ground for denying relief to a parent or grandparent to show that



he could have existed, or lived in a simpler and less comfortable manner, without the aid of the assistance rendered. In such case it was proper to consider and determine whether the aid given and contributions made were devoted, directly or indirectly, to the support and maintenance of the parent or grandparent, and whether they enabled such parent or grandparent to live more comfortably and enjoy life a little better than he could have done without such assistance. *Miller v. G.L. Arnett & Son*, 58 Idaho 420, 74 P.2d 177 (1937).

Where evidence showed that infant employee turned all his earnings over to his widowed mother, a partial dependency award to the mother was warranted even though the mother was temporarily employed at good wages. *Anderson v. Woesner*, 66 Idaho 441, 159 P.2d 899 (1944).

#### Scope of Section.

The statute providing death benefits related to benefits payable to, or for the benefit

of, dependents of an employee who had lost his life, by accident arising out of and in the course of his employment. *McRae v. School Dist. No. 23*, 56 Idaho 384, 55 P.2d 724 (1936).

One whose employment brought him within the scope and benefits of the law was entitled to compensation for loss of earning capacity due to injury by accident arising out of, and in the course of, his employment, and one who was dependent upon such employee at the time of the accident, as provided for by statute, if the employee died as a result of the accident, was entitled to compensation for loss of support due to the death, but was not entitled to compensation for loss of earning capacity of the employee during his lifetime. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

An award for an accrued claim by employee's administrator was not res judicata of claim by employee's dependents. *Linder v. Payette*, 64 Idaho 656, 135 P.2d 440 (1943).

**72-413A. Lump sum payment upon remarriage.** — In the event of remarriage of the widow or widower prior to the expiration of five hundred (500) weeks as provided in section [72-412] 42-412, Idaho Code, a lump sum shall be paid to the widow or widower in an amount equal to the lesser of one hundred (100) weeks or the total of income benefits for the remainder of the five-hundred (500) week period computed on the basis of a weekly rate of forty-five per cent (45%) of the average weekly state wage in effect at the time of remarriage. The provisions of this section shall not apply to benefits for an injury or occupational disease resulting in death where the accident causing the injury or the manifestation of the occupational disease occurred prior to July 1, 1991. [I.C., § 72-413A, as added by 1991, ch. 207, § 4, p. 488.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed reference "72-412" in this section was inserted by

the compiler, as this was thought to be the section intended.

### RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 161 et seq.

**C.J.S.** — 100 C.J.S., Workers' Compensation, § 598 et seq.

**72-414. Apportionment benefits between classes.** — In case there are two (2) or more classes of persons entitled to compensation under section 72-413, and the apportionment of such compensation as above provided, would result in injustice, the commission may, in its discretion, modify the apportionment to meet the requirements of the case. [I.C., § 72-414, as added by 1971, ch. 124, § 3, p. 422.]

**72-415. Change in dependents.** — Upon the cessation of the income benefits for death to or on account of any person, the income benefits of the remaining persons entitled to income benefits for the unexpired part of the period during which their income benefits are payable shall be that which such persons would have received if they had been the only persons entitled to income benefits at the time of the decedent's death. [I.C., § 72-415, as added by 1971, ch. 124, § 3, p. 422.]

**72-416. Maximum and minimum income benefits for death.** — (1) For purposes of income benefits for death, the average weekly wage of the employee shall be taken as not more than the average weekly wage of the state as determined in section 72-409, Idaho Code.

(2) In no case shall the aggregate weekly income benefits payable to all beneficiaries under this section exceed the maximum income benefits that were or would have been payable for total disability to the deceased. Provided, however, that where an employee's total disability benefits were or would have been less than forty-five per cent (45%) of the currently applicable average weekly state wage, death benefits shall be computed subject to the maximum of that to which a claimant would have been eligible after the first fifty-two (52) weeks of total disability. [I.C., § 72-416, as added by 1971, ch. 124, § 3, p. 422; am. 1981, ch. 261, § 5, p. 552.]

**72-417. Maximum total payment.** — The maximum weekly income benefits payable for all beneficiaries in case of death shall not exceed sixty per cent (60%) of the average weekly wage of the deceased as calculated under section 72-419, subject to the maximum limits in section 72-416. The classes of beneficiaries specified in paragraphs (1), (2) and (3) of section 72-413, shall have priority over all other beneficiaries in the apportionment of income benefits. If the provisions of said paragraphs should prevent payment to other beneficiaries of the income benefits to the full extent otherwise provided in section 72-413, the gross remaining amount of income benefits payable to such other beneficiaries shall be apportioned by class, proportionate to the interest of each class in the remaining amount. The dependents specified in paragraph [(3)] (4) of section 72-410, shall be considered to be in one (1) class and those specified in paragraph [(4)] (5) of said section, in another class. [I.C., § 72-417, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — Paragraphs (4) and (5) of § 72-410, referred to near the end of this section, were renumbered as paragraphs (3) and (4), respectively, of § 72-410 by S.L. 1989, ch. 194, § 1.

**72-418. Computation of weeks and days.** — In computing periods of disability and of compensation a week shall be computed as seven (7) days and a day as one-seventh (1/7) of a week, without regard to Sundays, holidays and working days. [I.C., § 72-418, as added by 1971, ch. 124, § 3, p. 422.]



**72-419. Determination of average weekly wage.** — Except as otherwise provided in this law, the average weekly wage of the employee at the time of the accident causing the injury or of manifestation of the occupational disease shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(1) If at such time the wages are fixed by the week, the amount so fixed shall be the average weekly wage.

(2) If at such time the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52).

(3) If at such time the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52).

(4)(a) If at such time the wages are fixed by the day, hour or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) his wages (not including overtime or premium pay) earned in the employ of the employer in the first, second, third or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the time of accident or manifestation of the disease.

(b) If the employee has been in the employ of the employer less than twelve (12) calendar weeks immediately preceding the accident or manifestation of the disease, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen (13) calendar weeks immediately preceding such time and had worked, when work was available to other employees in a similar occupation.

(5) If at such time the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.

(6) In seasonal occupations that do not customarily operate throughout the entire year, the average weekly wage shall be taken to be one-fiftieth ( $\frac{1}{50}$ ) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the time of the accident or manifestation of the disease.

(7) In the case of volunteer firemen, police and civil defense members or trainees, the income benefits shall be based on the average weekly wage in their regular employment.

(8) If the employee was a minor, apprentice or trainee at the time of the accident or manifestation of the disease, and it is established that under normal conditions his wages should be expected to increase during the period of disability that fact may be considered in computing his average weekly wage.

(9) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of such employment prior to the injury, the employee's wages from all such employers shall be considered as if earned from the employer liable for compensation.



(10) When circumstances are such that the actual rate of pay cannot be readily ascertained, the wage shall be deemed to be the contractual, customary or usual wage in the particular employment, industry or community for the same or similar service.

(11) In the case of public employees covered under section 72-205(6), Idaho Code, the income benefits shall be based on the greater of the average weekly wage of the employee's civilian employment and pay computed for one (1) weekend drill in a month, or full-time active duty pay fixed by the month as provided in section 46-605, Idaho Code. [I.C., § 72-419, as added by 1971, ch. 124, § 3, p. 422; am. 1981, ch. 261, § 6, p. 552; am. 1997, ch. 274, § 7, p. 799; am. 1999, ch. 118, § 3, p. 352.]

STATUTORY NOTES

**Cross References.** — Computing death benefits, §§ 72-413, 72-414.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

JUDICIAL DECISIONS

**Cited in:** *Hegel v. Kuhlman Bros.*, 115 Idaho 855, 771 P.2d 519 (1989); *Dohl v. PSF*

*Indus., Inc.*, 127 Idaho 232, 899 P.2d 445 (1995).

ANALYSIS

Computation method.  
—Hourly wage.  
Concurrent employment.  
Permanent physical disability.

**Computation Method.**

Where, because of the shortness of time of the injured claimant's employment, or from the nature of the employment, a rate of average weekly earnings cannot be practicably determined, a method for computation is provided by this section. However, where it appeared that the referee for the commission did not take into consideration this method of computation, the cause would be remanded back to the commission to again examine the issue. *Iverson v. Farming*, 103 Idaho 527, 650 P.2d 669 (1982).

Section 72-419(4)(a) calculates an employee's weekly wage rate by splitting into four 13 week periods the employee's wages earned in the 52 weeks previous to the injury; the wage period that is most favorable to the employee is then used in computing the employee's benefits. *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003).

**—Hourly Wage.**

Where agreement between claimant and the Industrial Special Indemnity Fund stated that claimant would be paid monthly benefits at the statutory rate and recited claimant's

hourly wage at \$5.06 per hour, and furthermore, the agreement explicitly stated that "no portion is a mere recital," the industrial commission correctly determined that the hourly wage recited in the agreement was the base rate to be used in computing claimant's average weekly wage; if claimant believed that his hourly wage was something other than the \$5.06 amount, the time to have raised this issue was during the settlement process or by way of a motion for rehearing or reconsideration. *Drake v. State, Indus. Special Indemnity Fund*, 128 Idaho 880, 920 P.2d 397 (1996).

**Concurrent Employment.**

Subdivision (9) of this section clearly contemplates the inclusion of a claimant's earnings from part-time employment in calculating his preinjury wages or income, and since there was no contention that the employer liable for compensation was unaware of the claimant's two part-time positions, the earnings from those part-time positions were properly included by the commission in its determination of the claimant's total preinjury annual income. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

Idaho industrial commission properly determined under § 72-212(7) and subdivision (9) of this section that the claimant's side business should not be determined in the computation of the claimant's total temporary disability benefits. *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003).

### **Permanent Physical Disability.**

This section is used to calculate the rate at

which income benefits are paid, which is better suited to mathematical calculation, but when evaluating a claimant's permanent physical disability, the industrial commission is required to consider the factors articulated in § 72-425 and cannot rely solely upon mathematical calculation. *Vassar v. J.R. Simplot Co.*, 134 Idaho 495, 5 P.3d 475 (2000).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

Average weekly wages — computation.

Construction.

Duty of board to find.

Part-time employment.

Temporary worker.

### **Average Weekly Wages — Computation.**

Where a report of a school district fixed the compensation of the janitor's wife at \$35.00 per month "plus room, heat, and light," she was receiving more than the minimum wage essential to an award of \$6.00 per week, and the evidence of the work actually performed by the janitor's wife, and the wages paid by the school district, coupled with such statement of the school board, justified the award of \$6.00 per week to a minor child by the industrial accident board. *Larson v. Independent Sch. Dist. No. 11-J*, 53 Idaho 49, 22 P.2d 299 (1933).

Since legislature intended the meaning as defined in this section for the term "average weekly wages" referred to in § 72-310 (see § 72-408) and the provisions in this section for 36 times hourly rate or  $4\frac{1}{2}$  times the day rate as the basis of calculating amount of compensation was applicable to part-time employee, board's award of \$37.00 per week as compensation to the part-time employee who had average hourly income of \$2.75 was correct. *Nelson v. Bogus Basin Recreational Ass'n*, 94 Idaho 175, 484 P.2d 290 (1971).

### **Construction.**

Reasonable intention of act as to amount of compensation was average weekly wages computed in such manner as best calculated to give average weekly earnings of workman, based on wages paid in industry for kind of services he was rendering. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

### **Duty of Board to Find.**

Where it appeared that the average weekly wage had not been proven, but notwithstanding this fact compensation was arbitrarily fixed and allowed, the order would be reversed and the case remanded to the industrial accident board with directions to permit

the employee to submit evidence supplying the deficiency, and to make findings of fact and conclusions of law in conformity with the evidence. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

Where there was not evidence to show the employee's average weekly earnings for a year previous to his death, a judgment awarding compensation would be reversed and remanded for the purpose of taking testimony to establish the amount of such earnings. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

### **Part-Time Employment.**

When employee worked only one hour per week as extra hand, measure of compensation for his death was average weekly wages for constant employment in his line and not amount received for his one hour work each week. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

The proper basis was the estimation of an employee's earnings who worked only on an average of one-half a year, whose employer likewise operated for the same period, on a weekly basis of  $1/52$  of the employee's yearly earnings. *Sugars v. Ohio Match Co.*, 53 Idaho 408, 23 P.2d 743 (1933).

Yearly average wage was applied where a carpenter was hired to apply eleven squares of shingles at a rate of \$2.00 per square, in computing the amount of weekly compensation. *O'Neil v. Madison Lumber & Mill Co.*, 61 Idaho 546, 105 P.2d 194 (1940).

### **Temporary Worker.**

Where disability claimant was a temporary construction worker hired out of his union hall for a small job and, thus, was paid less than the normal hourly wage paid to union members, claimant was not entitled to be compensated for his injury based on what he

might have been paid if hired for a different job. *Ragan v. Kenaston Corp.*, 126 Idaho 152, 879 P.2d 1085 (1994).

**72-420. Compensation to state when dependency not claimed or proved.** — In case no claim for compensation is made by a dependent of a deceased employee and filed with the commission within one (1) year after the death, or in case a claim is made and filed within such year and no dependency proven, the employer shall pay into the state treasury the sum of ten thousand dollars (\$10,000) to be deposited in the industrial special indemnity account. [I.C., § 72-420, as added by 1981, ch. 261, § 7, p. 552; am. 1986, ch. 93, § 4, p. 270.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 70-420 (I.C., § 72-420, as added by 1971, ch. 124, § 3, p. 422) was repealed by S.L. 1978, ch. 264, § 22.

**72-421. Refund of payment to state after delayed proof of claim by minor or incompetent dependent.** — If, after an employer has paid the sum provided for in section 72-420, Idaho Code, into the state treasury a claim is made and dependency proven by a person who during the one (1) year after the death in which a claim may be made was either a minor or mentally incompetent and who during the said year had no person or representative legally qualified under the provisions of the workmen's compensation law to make a claim in his behalf, such sum shall be repaid to the employer on the order of the industrial commission; provided, that nothing in this act shall be construed as extending or increasing the time during which a claim for compensation by a dependent may be made. [I.C., § 72-421, as added by 1982, ch. 231, § 3, p. 608.]

#### STATUTORY NOTES

**Prior Laws.** — A former section 72-421 1971, ch. 124, § 3, p. 422 was repealed by S.L. which comprised I.C. 72-421 as added by 1978, ch. 264, § 22.

**72-422. Permanent impairment.** — "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability. [I.C., § 72-422, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — "Permanent physical impairment" defined, § 72-332.



## JUDICIAL DECISIONS

## ANALYSIS

Construction.  
Industrial special indemnity fund liability.  
Legislative intent.  
Modification of agreement.  
Odd-lot status.  
Pain.  
Preexisting permanent impairment.  
Progressive impairment.

**Construction.**

"Permanent impairment," as defined in this section and incorporated by reference in § 72-332 as "permanent physical impairment" is confined to physical disabilities; thus, a pre-existing personality disorder, consisting of hypersensitivity to potential rejection, unwillingness to enter relationships, depression, humiliation, anxiety, anger, and impaired ability to function socially, but manifesting no bodily symptoms, was not a permanent physical impairment within the meaning of § 72-332 and this section, and the trial court erred in characterizing claimant's personality disorder as a preexisting physical impairment. *Hartley v. Miller-Stephan*, 107 Idaho 688, 692 P.2d 332 (1984).

**Industrial Special Indemnity Fund Liability.**

In order to establish industrial special indemnity fund (ISIF) liability under § 72-332, a claimant must prove that, prior to incurring an injury or occupational disease, he was suffering from a permanent physical impairment as defined in this section, with the further requirement under subsection (2) of § 72-332, that the impairment be of a seriousness to hinder or present an obstacle to claimant obtaining employment or re-employment. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

**Legislative Intent.**

Since the statutory definitions of "permanent physical impairment" under § 72-332 (prior to the 1978 and 1981 amendments), "permanent impairment" under this section and "permanent disability" under § 72-423 were passed simultaneously by the legislature, it can be concluded that the legislature intended that they define three different, but related, classifications. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

**Modification of Agreement.**

Where worker wanted modification of compensation agreement, and where agreement blurred the distinction between impairment and disability, commission did not err in refusing to reopen the case concerning worker's

previous injury; worker had no basis to establish different percentage figures for impairment and disability since there was no evidence that the degree of impairment in 1979 was greater than 20%, since worker's hip was relatively asymptomatic after the 1979 surgery, and since the record was silent as to any nonmedical factors, following the 1979 surgery, that could have caused the disability rating to deviate from the medically determined degree of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

**Odd-lot status.**

Where the plaintiff did not testify as to the types of lighter duty work that he was able to perform or the availability of such jobs in his geographical area, the record thus supported the commission's findings that the plaintiff did not meet his burden of establishing odd-lot status in order to qualify for total and permanent disability. *Dehlbohm v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 930 P.2d 1021 (1997).

**Pain.**

Pain can produce "functional . . . loss" under this section; since it relates to functional loss, pain is a medical factor to be considered in determining impairment itself. When a physician is satisfied that pain is genuine, it can be used—like pathology or loss of structural integrity—to measure the extent of an impaired function. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

Where commission's decision appeared to link pain issue with disability rather than impairment, and where commission's finding on impairment may have reflected a misapprehension of the governing law, remand was required. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

**Preexisting Permanent Impairment.**

The basic definition of permanent impairment is "any anatomic or functional abnormality or loss" and claimant's brachysyn-dactylism was a preexisting physical impairment with this definition. *Hoye v. Daw Forest*

Prods., Inc., 125 Idaho 582, 873 P.2d 836 (1994).

An impairment, the claim for benefits on which is an open, unresolved, and viable claim at the time of a subsequent injury, and which had not reached medical stability at the time of the subsequent injury, does not constitute a preexisting injury under the worker's compensation statutes. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

Where claimant suffered a series of injuries, and employer was held responsible for the portion of an earlier injury that was caused by industrial accident, the claim for which was resolved before apportionment was determined and before a classification of "pre-existing impairment" could be made, but that injury was medically stable before a subsequent injury was incurred, the industrial commission was able to make a determination that the earlier injury was ultimately preexisting. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

### Progressive Impairment.

Where both physicians testified that the claimant's condition was progressive, the in-

dustrial commission could not assess the claimant's permanent partial disability based solely upon his present level of impairment and erroneously relinquished jurisdiction over the future determination of the claimant's permanent disability. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

**Cited in:** *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975); *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Gordon v. West*, 103 Idaho 100, 645 P.2d 334 (1982); *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982); *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983); *Wolf v. Kaufman & Broad Home Sys.*, 106 Idaho 838, 683 P.2d 874 (1984); *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 712 P.2d 621 (1985); *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988); *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989); *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989); *Henderson v. McCain Foods*, — Idaho —, 130 P.3d 1097 (2006).

## DECISIONS UNDER PRIOR LAW

### Teeth.

The loss of front teeth by an employee who had been subsequently equipped with false teeth was, as a matter of law, a "physical impairment," and the injury resulting in the loss of teeth was compensable without neces-

sity of other evidence to establish the fact that deprivation of teeth had resulted in substantial loss to employee in his future work. *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941).

**72-423. Permanent disability.** — "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. [I.C., § 72-423, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Cross References.** — "Permanent physical impairment" defined, § 72-332.

## JUDICIAL DECISIONS

### ANALYSIS

Evidence.

Legislative intent.

Odd-lot status.

Permanent total disability.

Progressive impairment.

Purpose.

Test for determining permanent disability.



**Evidence.**

Since the degree of permanent disability was a factual question committed to the particular expertise of the commission, there was no error in the commission's action in considering a physician's answer to an interrogatory concerning the percentage of claimant's permanent partial disability over employer's objection to the physician's failure to separate the effect of a preexisting injury from the effect of the industrial accident. *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

**Legislative Intent.**

Since the statutory definitions of "permanent physical impairment" under § 72-332 (prior to the 1978 and 1981 amendments), "permanent impairment" under § 72-422 and "permanent disability" under this section were passed simultaneously by the legislature, it can be concluded that the legislature intended that they define three different, but related, classifications. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

**Odd-lot Status.**

Where claimant sought permanent disability under the odd-lot status and there was conflict between testimony of claimant's vocational counselor that claimant was not capable of performing any job and the testimony of company's vocational expert that claimant was suitable for several types of jobs, since Commission found the testimony of company's vocational expert to be more credible and persuasive, claimant's claim was denied and claimant's argument that company expert's evaluation should not be persuasive because there are no specific jobs available in the categories for which she found him to be qualified was without merit, for it has never been held that unless a prima facie case of odd-lot disability is established, an employer or ISIF must prove that there is a specific job in existence in order to defeat a claim for total or permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant for total disability failed to show that he had attempted other types of employment, that he did little to find work after leaving company, met with his vocational counselor only once, inquired about only a few jobs, and never sought employment in the area, and there was a conflict in the evidence about whether attempts to find employment would have been futile, he failed to establish odd-lot worker status. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

An employee may prove total disability under the odd-lot worker doctrine in one of three ways: 1. by showing that he has attempted other types of employment without success; 2.

by showing that he or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; 3. by showing that any efforts to find suitable employment would be futile. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant sought compensation for total and permanent disability under the definition of odd-lot worker and the evidence of claimant's vocational expert was that claimant was not capable of performing any type of job, but company's expert was of the opinion that even with claimant's partial disability there were still jobs he could perform, the question of whether claimant was an odd-lot worker became a question of fact for the Commission to decide. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Since the plaintiff did not testify as to the types of lighter duty work that he was able to perform or the availability of such jobs in his geographical area, the record thus supported the Commission's findings that the plaintiff did not meet his burden of establishing odd-lot status in order to establish permanent and total disability. *Dehlbohm v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 930 P.2d 1021 (1997).

The burden of proving a prima facie case of odd-lot status is on the claimant; however, where a dispute exists as to the extent of disability, the type of work the claimant is capable of performing, and the effort made to find suitable employment, whether the claimant is odd-lot status is a factual determination within the discretion of the Commission. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

A claimant may establish a prima facie case of odd-lot disability status as a matter of law only if the evidence is undisputed and is reasonably susceptible to only one interpretation. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

**Permanent Total Disability.**

Where Commission found that claimant suffered from a disability of 85% of the whole person and the finding was supported by competent evidence and not disputed by claimant, claimant failed to establish that he was totally and permanently disabled since his disability rating was less than 100%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

If the Commission finds that the claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical facts, total and permanent disability has been established. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).



Where a claimant demonstrates that he fits within the definition of an odd-lot worker he has proven total and permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Industrial commission did not have to specify the specific standard of review it utilized when it gave detailed explanations for its findings and conclusions. *Ball v. Daw Forest Prods. Co.*, 136 Idaho 155, 30 P.3d 933 (2001).

**Progressive Impairment.**

Where both physicians testified that the claimant's condition was progressive, the industrial commission could not assess the claimant's permanent partial disability based solely upon his present level of impairment and erroneously relinquished jurisdiction over the future determination of the claimant's permanent disability. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

**Purpose.**

The primary purpose of an award of permanent partial disability benefits is to compen-

sate the claimant for his loss of earning capacity or his reduced ability to engage in gainful activity. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

**Test for Determining Permanent Disability.**

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful activity. *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988).

**Cited in:** *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984); *Wolf v. Kaufman & Broad Home Sys.*, 106 Idaho 838, 683 P.2d 874 (1984); *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995); *Rivas v. K.C. Logging*, 134 Idaho 603, 7 P.3d 212 (2000).

**72-424. Permanent impairment evaluation.** — "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. [I.C., § 72-424, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Compiler's Notes.** — The word enclosed in parentheses so appeared in the law as enacted.

**JUDICIAL DECISIONS**

**ANALYSIS**

Benefits.  
Evidence.  
Factors considered.  
Medical appraisal.  
Medical experts.

**Benefits.**

Income benefits payable under the Workmen's Compensation Law, with the exception of retraining benefits, are based upon disability, either temporary or permanent, but not merely impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

While in some cases nonmedical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disabili-

ty rating, not merely the impairment rating. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

**Evidence.**

Where the evidence showed that the claimant, following his impairment and removal from the labor market as an ironworker due to a back injury, had educated and continued to educate himself for the purpose of teaching welding at a state university, and that the defendant employer had failed to establish

that the claimant could earn more than he was earning in that teaching position, the commission properly found that the claimant's 44% decrease in his wage-earning capacity from what he earned as an ironworker to what he earned as a teacher fully supported its award of a permanent partial disability equal to 44% of a whole man as a result of the back injury, even though the claimant's permanent physical impairment rating was only equivalent to 15% of the whole man. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

Medical testimony that claimant had actual physical impairment of 8% and that she also suffered a 7% impairment caused by conversion reaction hysteria, which caused symptoms of the physical injury to continue even after the physical damage was repaired, supported commission finding of 15% disability rating and denial of total and permanent disability claim. *Bartel v. J.R. Simplot Co.*, 106 Idaho 174, 677 P.2d 487 (1984).

There was substantial and competent evidence to support the Industrial Commission's rating of claimant's permanent partial impairment. *Nelson v. David L. Hill Logging*, 124 Idaho 855, 865 P.2d 946 (1993).

Evidence of the award of temporary use of a hospital bed was not inconsistent with the determination that there was no permanent impairment from the accident in issue. *Clark v. City of Lewiston*, 133 Idaho 723, 992 P.2d 172 (1999).

### Factors Considered.

Since § 72-425 required that nonmedical factors be considered in arriving at a permanent disability rating, and since the referee's finding of fact stated that nonmedical factors were not considered, it was clear that the award provided by the compensation agreement was based only upon a permanent impairment rating; however, that fact alone does not necessarily indicate that the award was for permanent impairment only. Whether the award was for permanent impairment or permanent disability is dependent on the actual agreement of the parties. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984).

Where the evidence showed that the claimant suffered a heart attack during the course of his employment, but the only evidence presented to the Industrial Commission in support of its determination that the claimant suffered a permanent partial impairment of 50 percent of the whole person failed to consider a preexisting heart condition, such determination was not supported by the evidence. *Johnson v. Amalgamated Sugar Co.*, 108 Idaho 765, 702 P.2d 803 (1985).

This section clearly suggests that subjective factors of pain and the claimant's unique

living conditions and lifestyle should be taken into account in arriving at a permanent impairment evaluation. *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 712 P.2d 621 (1985).

Where the impairment evaluation performed by the medical experts pursuant to this section included such subjective factors as pain, it was unnecessary for the commission to add a further disability award for pain pursuant to § 72-425. *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988).

### Medical Appraisal.

Industrial Commission need not accept the opinion of a claimant's treating physician regarding pain and impairment despite the fact that evaluation of permanent impairment is a "medical appraisal" since the words "medical appraisal" cannot obscure the fundamental principle that the Industrial Commission, rather than the claimant's treating physician, is the factfinder and the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

In making the "medical appraisal" of an injury's effect on daily living activities, there is a potentially wide spectrum of material and relevant evidence worthy of consideration, beyond the particular opinion of a physician asked to give an impairment rating. Such evidence, whether it tends to refute or establish the existence of an impairment, has a place in the Commission's effort to ascertain truth. Moreover, evidence impeaching a claimant's credibility, though coming from non-medical sources, need not be ignored in a permanent impairment hearing. Such evidence is particularly relevant where the claimant relies heavily on complaints of pain in asserting impairment. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

### Medical Experts.

A physician's opinion as to the extent of impairment is advisory only and is not binding upon the Commission. *Baker v. Louisiana Pac. Corp.*, 123 Idaho 799, 853 P.2d 544 (1993).

The Supreme Court will defer to the Commission's finding as to the credibility of medical experts. *Baker v. Louisiana Pac. Corp.*, 123 Idaho 799, 853 P.2d 544 (1993).

Physician opinions are not binding on the Commission, but are advisory. To be sure, the expert opinion of a physician who gives a permanent impairment rating pursuant to AMA guidelines may prove more helpful to the Commission or worthy of greater weight than that of a treating physician not asked to give an opinion on impairment. It does not follow, however, that reliable records and opinions of treating physicians are worthy of no consideration. It would be an improper invasion into the factfinding discretion of the



Industrial Commission for the courts hold that the commission must always give greater weight to one party's medical experts over the other. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

The Commission, in conducting a permanent impairment evaluation, is not limited to record or opinion evidence of a physician requested to give a permanent impairment

rating. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

**Cited in:** *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975); *Gordon v. West*, 103 Idaho 100, 645 P.2d 334 (1982); *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983); *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

**72-425. Permanent disability evaluation.** — "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors as provided in section 72-430, Idaho Code. [I.C., § 72-425, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 132, § 2, p. 1329; am. 1982, ch. 231, § 4, p. 608.]

## STATUTORY NOTES

**Compiler's Notes.** — The word enclosed in parentheses so appeared in the law as enacted.

## JUDICIAL DECISIONS

### ANALYSIS

Ability to engage in gainful activity.  
Benefits.  
Equal protection.  
Evaluation of permanent disability.  
Evidence.  
— Burden of proof.  
— Pain.  
— Work provided by sympathetic employer.  
Expert testimony.  
Failure to include impairments.  
Findings.  
Future medical care.  
In general.  
Lost earning capacity.  
— Calculation.  
— Future wage increases.  
— Hourly wages.  
Medical factors.  
Modification of agreement.  
Nonmedical factors.  
Odd-lot status.  
Permanent partial disability.  
Progressive impairment.  
Psychological disorder.  
Successive injuries.  
Suitable work.  
Total disability.  
Various factors considered.

### Ability to Engage in Gainful Activity.

Employee provided no authority for her claim that either "wages" or "wage earning

capacity" as used in § 72-102(30), and "ability to engage in gainful activity" as used in this section are synonymous. *Vassar v. J.R.*



Simplot Co., 134 Idaho 495, 5 P.3d 475 (2000).

### **Benefits.**

Income benefits payable under the Worker's Compensation Law, with the exception of retraining benefits, are based upon disability, either temporary or permanent, but not merely impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

While in some cases nonmedical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the impairment rating. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

### **Equal Protection.**

This section does not violate the equal protection provision of the state constitution, Idaho Const., Art. I, § 13, because it allows different awards dependent on the claimant's age and sex. *Murray v. Hecla Mining Co.*, 98 Idaho 688, 571 P.2d 334 (1977).

### **Evaluation of Permanent Disability.**

In evaluating permanent disability under this section and I.C. § 72-430, all physical impairments that were caused by the work-related injury and by all pre-existing impairments or physical conditions should be taken into account; otherwise, there would be no determination of disability that would permit an apportionment for pre-existing impairments under I.C. §§ 72-406 and 72-332. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

The permanent disability evaluation outlined in this section was the first in a two-step process that preceded the analysis to determine whether any liability for the claimant's total permanent disability would be apportioned to the defendant indemnity fund. *Eckhart v. State, Indus. Special Indem. Fund*, 133 Idaho 260, 985 P.2d 685 (1999).

The evaluation of permanent disability includes consideration of all physical impairments that were caused by the claimant's work-related injury and pre-existing impairments or physical conditions. *Eckhart v. State, Indus. Special Indem. Fund*, 133 Idaho 260, 985 P.2d 685 (1999).

### **Evidence.**

Since the degree of permanent disability was a factual question committed to the particular expertise of the commission, there was no error in the commission's action in considering a physician's answer to an interrogatory concerning the percentage of claimant's permanent partial disability over employer's objection to the physician's failure to separate the effect of a preexisting injury from the effect of the industrial accident. *Thom v.*

*Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

Where a claimant fell into the "odd-lot" category of workers who are physically able to perform some work but are so handicapped that they will not be employed regularly in any well-known branch of the labor market, the statutory requirement that the commission consider the economic and social environment in which a claimant lives in evaluating his disability would necessitate the introduction of evidence that there was an actual job within a reasonable distance from the claimant's home which he was able to perform or for which he could be trained and which he had a reasonable opportunity to obtain. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

If a claimant falls in the odd-lot category, it is improper for the commission to equate the rating of the claimant's permanent impairment with its rating of his disability without explicit consideration of the types of employment the claimant can now perform. *Francis v. Amalgamated Sugar Co.*, 98 Idaho 407, 565 P.2d 1364 (1977).

A witness who was generally familiar with the claimant's physical condition and was experienced in the general area of industrial employment placement was competent to testify with respect to non-medical factors relevant to the claimant's disability. *Murray v. Hecla Mining Co.*, 98 Idaho 688, 571 P.2d 334 (1977).

Where there was substantial though conflicting evidence, both of claimant's ability to work and the availability of work, including testimony that claimant could work for a full day at a time in a sedentary-type job, that the area was a healthy labor market, considered good for female workers, and that there were sedentary jobs with training available as turnover created them within the labor market, the industrial commission did not err in its finding of fact which precluded the application of the "odd-lot" classification. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 619 P.2d 1152 (1980).

Where the evidence showed that the claimant, following his impairment and removal from the labor market as an ironworker due to a back injury, had educated and continued to educate himself for the purpose of teaching welding at a state university, and that the defendant employer had failed to establish that the claimant could earn more than he was earning in that teaching position, the commission properly found that the claimant's 44% decrease in his wage-earning capacity from what he earned as an ironworker to what he earned as a teacher fully supported its award of a permanent partial disability equal to 44% of a whole man as a result of the back injury, even though the claimant's permanent physical impairment rating was only

equivalent to 15% of the whole man. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

The industrial commission did not err in failing to find a permanent disability in excess of ten percent of the whole person, where the claimant made no concrete showing of disability greater than the permanent impairment rating of ten percent. *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983).

Where the testimony of the claimant indicated pre-injury she was earning \$3.40 or \$3.45 per hour, and post-injury was earning \$3.35 per hour, and her complaint of chronic back pain and inability to work beyond five hours per day were met with testimony that there was no anatomical cause for her pain, no physical evidence of injury, and that the large bulk of her complaints were independent of the effects of the injury and attributable to other factors, there was substantial competent evidence supporting the decision of the industrial commission that claimant suffered a permanent partial disability of five percent. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985).

There was sufficient evidence to support the Commission's finding of a 35% permanent partial disability in excess of impairment. *Baker v. Louisiana Pac. Corp.*, 123 Idaho 799, 853 P.2d 544 (1993).

#### —Burden of Proof.

The burden of proof is upon the claimant to prove disability in excess of his impairment rating, although expert testimony on this issue need not be presented; the test for such determination is not whether the claimant is able to work at some employment, but rather whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful activity. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985).

#### —Pain.

Although medical panels did not specifically designate a portion of the impairment rating as based solely on pain, the reports of both panels clearly took into account claimant's past complaints of pain; thus, there was competent evidence supporting the industrial commission's finding that pain was a component of the impairment rating. *Pomerinke v. Excel Trucking Transport*, 124 Idaho 301, 859 P.2d 337 (1993).

#### —Work Provided by Sympathetic Employer.

Where the industrial commission found that claimant's later employment by Department of Parks was essentially the equivalent of work provided by a sympathetic employer or friend and this conclusion was supported by the record, the finding that claimant was

odd-lot totally permanently disabled prior to her most recent injury and the total permanent disability did not result from combined effects was affirmed. *Bybee v. State, Indus. Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

#### Expert Testimony.

Although it is true that the burden of proof is upon the claimant to prove disability in excess of his impairment rating, the claimant is not required to present expert testimony as part of his case. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984).

#### Failure to Include Impairments.

Where worker, after work-related accident which affected his right hip, had a later injury to his left hip, shoulders and back due to arthritis and spondylolisthesis, commission should have included the impairments to worker's left hip, his shoulders, and his back in making its evaluation of the degree of his total and permanent disability since the conditions that caused these impairments existed at the time of the injury to worker's right hip; whether any of these impairments led to liability of employer and its surety or the industrial special indemnity fund (ISIF) depended on apportionment under I.C. §§ 72-406 and 72-332. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

#### Findings.

The commission's recitation that it has considered medical and nonmedical factors including the claimant's age, sex, education, economic and social environment and training and usable skills in evaluating his disability is not a substitute for an explicit finding of what kind of suitable work is available to the claimant who is in the odd-lot category and such an explicit finding is required in that situation. *Francis v. Amalgamated Sugar Co.*, 98 Idaho 407, 565 P.2d 1364 (1977).

The commission's reliance, on the fact that claimant in an attempt to provide his own means of employment purchased a truck in order to become an independent truck driver, was misplaced in determining that he was not entitled to disability compensation additional to his medical impairment rating, since he lost the money in the six months of his attempt to become an independent truck driver; this is an economic factor which tended to show that he was disabled in excess of his medical impairment, not a factor negating such an award. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984).

It was error on the part of the commission to look at one two-week earning period after the claimant's accident and conclude that because the claimant was earning more in this period, if computed on a yearly basis,



than he did before his accident that he necessarily did not suffer a loss in his earning capacity or in ability to engage in gainful activity. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984).

Whether a claimant falls within the odd-lot category is a factual determination and it is the duty of the industrial commission to make this determination and the Commission's findings will not be set aside on appeal if based upon substantial and competent evidence; furthermore, it is the claimant's burden to establish a prima facie case that he is a member of the odd-lot category. *Rost v. J.R. Simplot Co.*, 106 Idaho 444, 680 P.2d 866 (1984).

Where the employer progressively moved the claimant to less demanding jobs, until finally terminating his employment because of "physical incapacity," the claimant suffered pain and discomfort to the point that he no longer wears his prosthesis even though he had the lipoma surgically removed from his stump, and the claimant had a low I.Q. and an eighth grade education, the industrial commission did not abuse its discretion by placing the claimant into the odd-lot category. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

#### **Future Medical Care.**

Industrial commission did not err in entering a final disability award without retaining jurisdiction where the commission took into consideration future surgery in arriving at a disability rating. *Hodges v. W.B. Savage Ranches*, 116 Idaho 699, 778 P.2d 801 (1989).

#### **In General.**

The central focus of this section in determining whether to award total permanent disability benefits to the claimant is on the claimant's ability to engage in gainful activity. *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983).

#### **Lost Earning Capacity.**

##### **—Calculation.**

In determining a claimant's permanent partial disability, the industrial commission is not required to utilize pre-injury and post-injury annual earnings, rather than looking to hourly wages. *McClurg v. Yanke Mach. Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

##### **—Future Wage Increases.**

Claim that the industrial commission should have considered wage increases implemented by claimant's former employer during the interim between his injury and subsequent employment with another employer was unsupported by law and too speculative as it could not be ascertained whether claimant would have continued working for former

employer, or whether he would have received the same raises that current employees received. *McClurg v. Yanke Mach. Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

Probable future wage increases are speculative and unsupported by law unless the claimant is performing the act being used as the test pre-injury and post-injury; thus, where claimant's employment activity changed after he was injured, any future wage increases that he may have received had he remained in his pre-injury employment activity were unascertainable and irrelevant. *Reiher v. American Fine Foods*, 126 Idaho 58, 878 P.2d 757 (1994).

##### **—Hourly Wages.**

The industrial commission's comparison of claimant's hourly wages to assist in its determination of his lost earning capacity was proper where the numbers it relied upon to represent the loss of earning capacity were supported by substantial competent evidence. *McClurg v. Yanke Mach. Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

#### **Medical Factors.**

For application of the formula outlined in *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984), to worker's compensation claim for total permanent disability after suffering from both a preexisting condition and an industrial accident, see *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

#### **Modification of Agreement.**

Where worker wanted modification of compensation agreement, and where agreement blurred the distinction between impairment and disability, commission did not err in refusing to reopen the case concerning worker's previous injury; worker had no basis to establish different percentage figures for impairment and disability since there was no evidence that the degree of impairment in 1979 was greater than 20%, since worker's hip was relatively asymptomatic after the 1979 surgery, and since the record was silent as to any nonmedical factors, following the 1979 surgery, that could have caused the disability rating to deviate from the medically determined degree of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

#### **Nonmedical Factors.**

It was not error for the commission to conclude that a claimant's physical appearance and history of excessive alcohol consumption constituted pertinent nonmedical factors under this section and § 72-430, rather than physical impairments under either § 72-332 or § 72-406, where the industrial commission found that claimant's phys-



ical appearance and history of excessive alcohol consumption did not hinder him in his earning capacity prior to the accident, where, since he was a teenager claimant had functioned in the manual labor market without suffering any loss of potential earning capacity, and where claimant's physical appearance and history of excessive alcohol consumption had not served as a hindrance in that job market. *Roberts v. Asgrow Seed Co.*, 116 Idaho 209, 775 P.2d 101 (1989).

Liability for nonmedical factors should be apportioned between the employer and the industrial special indemnity fund in proportion to their respective percentages of responsibility for the physical impairment. *Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001).

Because industrial commission found that a workers seizures were due to alcohol withdrawal, it also considered them as a pertinent nonmedical factor; the industrial commission also took into account how those factors would affect the worker's future ability to work. *Ball v. Daw Forest Prods. Co.*, 136 Idaho 155, 30 P.3d 933 (2001).

### **Odd-lot Status.**

Since the plaintiff did not testify as to the types of lighter duty work that he was able to perform or the availability of such jobs in his geographical area, the record thus supported the Commission's findings that the plaintiff did not meet his burden of establishing odd-lot status in order to establish permanent and total disability. *Dehlbom v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 930 P.2d 1021 (1997).

Where claimant sought permanent disability under the odd-lot status and there was conflict between testimony of claimant's vocational counselor that claimant was not capable of performing any job and the testimony of company's vocational expert that claimant was suitable for several types of jobs, since Commission found the testimony of company's vocational expert to be more credible and persuasive, claimant's claim was denied and claimant's argument that company expert's evaluation should not be persuasive because there are no specific jobs available in the categories for which she found him to be qualified was without merit, for it has never been held that unless a prima facie case of odd-lot disability is established, an employer or ISIF must prove that there is a specific job in existence in order to defeat a claim for total or permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant for total disability failed to show that he had attempted other types of employment, that he did little to find work after leaving company, met with his vocational counselor only once, inquired about

only a few jobs, and never sought employment in the area, and there was a conflict in the evidence about whether attempts to find employment would have been futile, he failed to establish odd-lot worker status. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

An employee may prove total disability under the odd-lot worker doctrine in one of three ways: 1. by showing that he has attempted other types of employment without success; 2. by showing that he or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; 3. by showing that any efforts to find suitable employment would be futile. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant sought compensation for total and permanent disability under the definition of odd-lot worker and the evidence of claimant's vocational expert was that claimant was not capable of performing any type of job, but company's expert was of the opinion that even with claimant's partial disability there were still jobs he could perform, the questions of whether claimant was an odd-lot worker became a question of fact for the Commission to decide. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

The burden of proving a prima facie case of odd-lot status is on the claimant; however, where a dispute exists as to the extent of disability, the type of work the claimant is capable of performing, and the effort made to find suitable employment, whether the claimant is odd-lot status is a factual determination within the discretion of the Commission. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

A claimant may establish a prima facie case of odd-lot disability status as a matter of law only if the evidence is undisputed and is reasonably susceptible to only one interpretation. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where a claimant demonstrates that he fits within the definition of an odd-lot worker he has proven total and permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

### **Permanent Partial Disability.**

The primary purpose of an award of permanent partial disability benefits is to compensate the claimant for his loss of earning capacity or his reduced ability to engage in gainful activity. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

### **Progressive Impairment.**

When a claimant's impairment is progressive, the industrial commission may estimate his probable future disability and reduce it to

present value for the purpose of making a final award which takes into account probable future changes in impairment. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

### **Psychological Disorder.**

Even though the claimant's personality disorder lacked physical manifestations, the industrial commission was correct in including the psychological disorder as a personal circumstance and allocating responsibility between the Special Indemnity Fund and the employer/surety. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

### **Successive Injuries.**

When evaluating a claimant's ability to find employment in the future, the commission must consider all of his physical impairments, not just the most recent one, since the effect of successive injuries may be greater than the sum of the impairments resulting from each. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

Where the commission, in evaluating the disability of a claimant who suffered successive injuries, apparently concluded that since the most recent injury was not in itself totally disabling and since the previous injuries had not been disabling in the past, the claimant was not totally and permanently disabled, the commission's approach did not adequately consider the effect of nonmedical factors, such as the claimant's lack of an education or special training or skills, which had not prevented the claimant from working when he was able to do heavy manual labor but would undoubtedly lessen his chances of finding employment in the future since he could no longer perform such labor. *Lyons v. Industrial Special Indem. Fund*, 98 Idaho 403, 565 P.2d 1360 (1977).

Evidence supported industrial commission's finding that although claimant was found to have a permanent disability of 30% of the whole person after his second injury, because most of his limitations existed prior to the second injury, the portion of claimant's disability resulting from the second injury did not exceed the portion of the physical impairment rating of five percent attributable to that injury; the remainder of claimant's disability rating accrued prior to the 1989 injury, thus insurer was not liable for that portion. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

### **Suitable Work.**

If the evidence of medical and nonmedical factors before the commission prima facie places them in the "odd-lot" category, the

burden is then on the employer to show that some kind of suitable work is regularly and continuously available to the claimant that there is an actual job within a reasonable distance from appellant's home which he is able to perform or for which he can be trained and that the injured worker has a reasonable opportunity to be employed at that job. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 619 P.2d 1152 (1980).

Where the plaintiff's injury to his neck, which occurred while loading timber onto a truck, resulted in a disability of 15 percent of the whole man, a finding supported by both competent medical and nonmedical evidence, he was not entitled to benefits for a total disability simply because he could not perform adequately in his previous job as a truck driver, since he had not shown there was no suitable occupation open to him. *Gordon v. West*, 103 Idaho 100, 645 P.2d 334 (1982).

Testimony that claimant had been performing the duties of cooking and meal planning for residents of "retirement home" run in claimant's home supported the conclusion that claimant had not only attempted other employment, but had successfully performed other work, and, therefore, there was substantial and competent evidence to support the commission's conclusion that claimant failed to establish a prima facie case that he fell within the odd-lot category. *Rost v. J.R. Simplot Co.*, 106 Idaho 444, 680 P.2d 866 (1984).

A claimant must do more than assert that he cannot perform his previous type of employment in order to qualify as an "odd-lot" worker; he must show what other types of employment he has attempted. The commission, as the factfinder, must consider whether the claimant has tried and could not perform other work. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

If the evidence of the medical and nonmedical factors places a claimant prima facie in the odd-lot category the burden is then on the employer, the Special Indemnity Fund, to show that some kind of suitable work is regularly and continuously available to the claimant. In meeting its burden, it will not be sufficient for the fund to merely show that the claimant is able to perform some type of work; it is necessary that the fund introduce evidence that there is an actual job within a reasonable distance from claimant's home which he is able to perform or for which he can be trained. In addition, the fund must show that the claimant has a reasonable opportunity to be employed at that job. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

The industrial commission did not err in holding that the claimant satisfied his burden of showing a prima facie case of being an



"odd-lot" worker where the evidence showed that the claimant had inquired into work and that his further efforts would have been futile in view of the lack of sedentary work available, claimant's inability to travel, claimant's lack of qualifications for any sedentary work that was available, and claimant's inability to work regularly and steadily due to his unreliable physical condition. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

#### **Total Disability.**

Though an employee acknowledged that he thought he could perform work that did not require him to do any of the things that aggravated his condition, this did not preclude a finding of total disability. *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979).

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced the claimant's capacity for gainful activity." *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988).

Where Commission concluded and found that worker suffered an impairment of 15% of the whole man as a result of injury in 1979, an impairment of nine percent of the whole man as a result of 1982 accident, and an additional 76% disability as a result of nonmedical factors such as age, training, transferable skills, background and work experience and where consequently, the commission found worker was totally and permanently disabled within the odd-lot category, commission's findings were supported by substantial competent evidence and such findings were not disturbed on appeal. *Hegel v. Kuhlman Bros.*, 115 Idaho 855, 771 P.2d 519 (1989).

Where Commission found that claimant suffered from a disability of 85% of the whole person and the finding was supported by competent evidence and not disputed by claimant, claimant failed to establish that he was totally and permanently disabled since his disability rating was less than 100%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

If the Commission finds that the claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical facts, total and permanent disability has been established. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Commission did not err in denying the employee's claim for disability benefits where the therapist testified that the therapist was unable to rate the employee because the employee failed to try to perform the tests, and

the representations about the employee's abilities lacked credibility. *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 38 P.3d 617 (2001).

#### **Various Factors Considered.**

A claimant's impairment evaluation or rating is one component or element to be considered by the commission in determining a claimant's permanent partial disability, and is not the exclusive factor determinative of the disability rating fixed by the commission. A disability rating may exceed the claimant's impairment rating. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

The commission did not apply the standard set forth in this section in determining that claimant was not entitled to a disability award greater than his medical impairment rating, where there was no indication that the commission examined his ability to engage in gainful activity as it was affected by nonmedical factors, such as the fact that he was 43 years of age with no formal education or ability to read or write; that he could no longer engage in construction or farm work and that his ability to drive trucks was diminished by his accident. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984).

The fact that claimant was able to continue truck driving in spite of injury did not establish that his ability to engage in gainful activity was not diminished by the nonmedical factors the commission is required to consider under this section. *Bennett v. Clark Hereford Ranch*, 106 Idaho 438, 680 P.2d 539 (1984).

Disability must include medical impairment, but medical impairment will not always be the same as disability. *Fenich v. Boise Elks Lodge No. 310*, 106 Idaho 550, 682 P.2d 91 (1984).

Since this section required that nonmedical factors be considered in arriving at a permanent disability rating, and since the referee's finding of fact stated that nonmedical factors were not considered, it was clear that the award provided by the compensation agreement was based only upon a permanent impairment rating; however, that fact alone does not necessarily indicate that the award was for permanent impairment only. Whether the award was for permanent impairment or permanent disability is dependent on the actual agreement of the parties. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984).

This section requires the industrial commission to take into consideration nonmedical factors such as age, sex, education, and economic and social environment. *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985).

"Where, the impairment evaluation per-



formed by the medical experts pursuant to § 72-424 included such subjective factors as pain," it was unnecessary for the commission to add a further disability award for pain pursuant to this section. *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988).

Section 72-419 is used to calculate the rate at which income benefits are paid, which is better suited to mathematical calculation, but when evaluating a claimant's permanent physical disability, the industrial commission

is required to consider the factors articulated in this section and cannot rely solely upon mathematical calculation. *Vassar v. J.R. Simplot Co.*, 134 Idaho 495, 5 P.3d 475 (2000).

**Cited in:** *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982); *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Rivas v. K.C. Logging*, 134 Idaho 603, 7 P.3d 212 (2000); *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 38 P.3d 617 (2001).

**72-426. The whole man — A period of five hundred weeks.** — The "whole man" for purposes of computing disability evaluation of scheduled or unscheduled permanent injury (bodily loss or losses or loss of use) for conversion to scheduled income benefits, shall be a deemed period of disability of five hundred (500) weeks. [I.C., § 72-426, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**72-427. Permanent impairment evaluation not exclusive.** — The "whole man" income benefit evaluation for purposes of computing scheduled and unscheduled permanent impairment shall not be deemed to be exclusive for the purposes of fixing the evaluation of permanent disability. [I.C., § 72-427, as added by 1971, ch. 124, § 3, p. 422.]

#### JUDICIAL DECISIONS

##### ANALYSIS

Determination of permanent partial disability.  
Other factors considered.

##### Determination of Permanent Partial Disability.

A claimant's impairment evaluation or rating is one component or element to be considered by the commission in determining a claimant's permanent partial disability, and is not the exclusive factor determinative of the disability rating fixed by the commission. A disability rating may exceed the claimant's impairment rating. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

##### Other Factors Considered.

Where the evidence showed that the claimant, following his impairment and removal from the labor market as an ironworker due to a back injury, had educated and continued to educate himself for the purpose of teaching

welding at a state university, and that the defendant employer had failed to establish that the claimant could earn more than he was earning in that teaching position, the commission properly found that the claimant's 44% decrease in his wage-earning capacity from what he earned as an ironworker to what he earned as a teacher fully supported its award of a permanent partial disability equal to 44% of a whole man as a result of the back injury, even though the claimant's permanent physical impairment rating was only equivalent to 15% of the whole man. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982).

**Cited in:** *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

**72-428. Scheduled income benefits for loss or losses of use of bodily members.** — An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five percent (55%) of the average weekly state wage stated against the following scheduled permanent impairments respectively:

(1) Amputations of Upper Extremities	Weeks
Forequarter amputation	350
Disarticulation at shoulder joint	300
Amputation of arm above deltoid insertion	300
Amputation of arm between deltoid insertion and elbow joint	285
Disarticulation at elbow joint	285
Amputation of forearm below elbow joint proximal to insertion of biceps tendon	285
Amputation of forearm below elbow joint distal to insertion of biceps tendon	270
Disarticulation at wrist joint	270
Midcarpal or mid-metacarpal amputation of hand	270
Amputation of all fingers except thumb at metacarpophalangeal joints	160
Amputation of thumb	
At metacarpophalangeal joint or with resection of carpometacarpal bone	110
At interphalangeal joint	80
Amputation of index finger	
At metacarpophalangeal joint or with resection of metacarpal bone	70
At proximal interphalangeal joint	55
At distal interphalangeal joint	30
Amputation of middle finger	
At metacarpophalangeal joint or with resection of metacarpal bone	55
At proximal interphalangeal joint	45
At distal interphalangeal joint	25
Amputation of ring finger	
At metacarpophalangeal joint or with resection of metacarpal bone	25

At proximal interphalangeal joint	20
At distal interphalangeal joint	12
Amputation of little finger	
At metacarpophalangeal joint	
or with resection of	
metacarpal bone	15
At proximal interphalangeal joint	10
At distal interphalangeal joint	5
(2) Amputations of Lower Extremities	
Hemipelvectomy	250
Disarticulation at hip joint	200
Amputation above knee joint with	
short thigh stump (3" or less	
below tuberosity of ischium)	200
Amputation above knee joint	
with functional stump	180
Disarticulation at knee joint	180
Gritt-Stokes amputation	180
Amputation below knee joint with	
short stump (3" or less below	
intercondylar notch)	180
Amputation below knee joint with	
functional stump	140
Amputation at ankle (Syme)	140
Partial amputation of foot	
(Chopart's)	105
Mid-metatarsal amputation	70
Amputation of all toes	
At metatarsophalangeal joints	42
Amputation of great toe	
With resection of metatarsal bone	42
At metatarsophalangeal joint	25
At interphalangeal joint	25
Amputation of lesser toe (2nd-5th)	
With resection of metatarsal bone	7
At metatarsophalangeal joint	4
At proximal interphalangeal joint	3
At distal interphalangeal joint	1
(3) Loss of Vision and Hearing	
Total loss of vision of one eye .....	150
Loss of one eye by enucleation .....	175
Total loss of binaural hearing .....	175

(4) Total loss of use. Income benefits payable for permanent disability attributable to permanent total loss of use of [or] comparable total loss of use of a member shall not be less than as for the loss of the member.

(5) Partial loss or partial loss of use. Income benefits payable for permanent partial disability attributable to permanent partial loss or loss of use,



of a member shall be not less than for a period as the permanent impairment attributable to the partial loss or loss of use of the member bears to total loss of the member.

(6) Delay in rating. Following the period of recovery, a permanently disabled employee who has been afforded vocational retraining under a rehabilitation program shall be rated for permanent impairment only until completion of the vocational retraining program at which time he shall be rated for permanent disability, deducting from any monetary award therefor amounts previously awarded for permanent impairment only. [I.C., § 72-428, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 132, § 3, p. 1329; am. 1978, ch. 264, § 11, p. 572.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed word "or" in subdivision (4) was inserted by the compiler.

### JUDICIAL DECISIONS

#### ANALYSIS

Attorney fees.

Benefits although employed.

Evaluation of permanent impairment.

Eyes.

Fixed and quantifiable benefits.

Nonmedical factors.

Progressive impairment.

Ratings inapplicable.

Retention of jurisdiction.

Retraining.

—Travel accommodations.

Unscheduled impairment.

#### Attorney Fees.

Where employee's award was statutorily determined under subsection (2) of this section, it was reasonable for the commission to conclude that employee would have received the same award regardless of his attorney's involvement, and substantial and competent evidence supported the industrial commission's determination that the attorney was not primarily or substantially responsible for securing employee's award. *Johnson v. Boise Cascade Corp.*, 134 Idaho 350, 2 P.3d 735 (2000).

#### Benefits Although Employed.

Industrial Special Indemnity Fund (ISIF) was liable for payment of income benefits to worker even while worker was employed since the liabilities of employer and ISIF for the benefits provided under § 72-408 and this section were established by the determination of total permanent disability and the apportionment of the liability for this disability between them; once worker was determined

to be totally permanently disabled the fact that she was able to find some employment that provided her with income did not affect her right to receive the compensation to which she was entitled because of her disability. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

#### Evaluation of Permanent Impairment.

The workmen's compensation law contemplates evaluation of permanent impairment in terms of the "whole man" and in terms of impairment of body extremities as provided by the schedule of income benefits found in this section. *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975).

Industrial commission was not compelled to defer evaluating the permanent disability of an employee for whom retraining had been provided until the retraining had been completed. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

**Eyes.**

Commission's determination of the degree of loss of vision to claimant's left eye, because of the loss of the natural lens as permanent partial impairment of fifty percent of the left eye even though an artificial lens was implanted in place of the natural lens, was not contrary to *Kelly v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934) holding that in determining the specific indemnity for loss of vision corrective glasses and other artificial means should not be considered. *Burke v. EG & G/Morrison-Knudsen Constr. Co.*, 126 Idaho 413, 885 P.2d 372 (1994).

Where claimant because of being struck in the eye by a metal fragment had to have his natural lens removed and an artificial lens implanted, evidence submitted on the question of possible complications that claimant might experience as a result of the artificial lens was speculative and highly unlikely, and thus commission's finding that claimant would not suffer from progressive impairment or serious complications because of his condition was not in error. *Burke v. EG & G/Morrison-Knudsen Constr. Co.*, 126 Idaho 413, 885 P.2d 372 (1994).

**Fixed and Quantifiable Benefits.**

Once a claimant's condition is stabilized and his disability is rated, his benefits are calculated differently: If the disability is total, it is still computed by the "currently applicable average weekly state wage" of § 72-408(1) or (2), but if it is a partial permanent disability, it is calculated under this section, which makes no reference to the "currently applicable" average weekly state wage of § 72-408(1) and (2). Hence, the legislature intended benefits for partial permanent disability to be fixed and quantifiable. Partial permanent disability benefits are not, nor are they intended to be, whole-life benefits. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

**Nonmedical Factors.**

In awarding claimant permanent partial impairment of fifty percent of the left eye where because of being hit in the left eye by a metal fragment surgical removal of the claimant's natural lens and the implanting of an artificial lens was required, commission's consideration of such nonmedical factors as claimant's educational background, his vocational training, his employment after the injury, and the status of the economy and the construction industry in the locale of his residence in determining the degree of permanent disability was proper, and evidence supported the finding that the nonmedical factors did not increase claimant's permanent partial disability and that such disability did not exceed his permanent physical impairment rating. *Burke v. EG & G/Morrison-Knudsen*

*Constr. Co.*, 126 Idaho 413, 885 P.2d 372 (1994).

**Progressive Impairment.**

Where both physicians testified that the claimant's condition was progressive, the industrial commission could not assess the claimant's permanent partial disability based solely upon his present level of impairment and erroneously relinquished jurisdiction over the future determination of the claimant's permanent disability. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

**Ratings Inapplicable.**

Medical impairment ratings may be dispositive when a claimant's infirmity is limited to a scheduled loss for which the legislature has prescribed income benefits; however, hysterical neurosis is not such a loss. *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979).

**Retention of Jurisdiction.**

In a situation where the claimant's impairment is progressive and, therefore, cannot adequately be determined for purposes of establishing a permanent disability rating, it is entirely appropriate for the industrial commission to retain jurisdiction until such time as the claimant's condition is nonprogressive. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

In action seeking increase in award for permanent disability of his eye in which his natural lens was removed and an artificial lens was implanted due to claimant being struck in the eye by a metal fragment, the commission applied the correct legal standard in declining to retain jurisdiction where claimant's impairment was nonprogressive and could be determined for establishing a permanent disability rating. *Burke v. EG & G/Morrison-Knudsen Constr. Co.*, 126 Idaho 413, 885 P.2d 372 (1994).

**Retraining.**

Nothing in either § 72-450 or this section requires the industrial commission to order retraining for a disabled employee. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

**—Travel Accommodations.**

An injured employee for whom retraining is authorized or ordered under § 72-450 is entitled to be furnished by the employer with reasonable travel accommodations to and from a facility approved by the commission for the retraining. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990).

**Unscheduled Impairment.**

Impairment attributable to an injured and replaced hip is not among the "scheduled



permanent impairments" enumerated in this section; rather, it is an unscheduled impairment, to be determined by analogy to the statutory schedule. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

**Cited in:** *Cook v. Cook*, 102 Idaho 651, 637 P.2d 799 (1981); *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Eyes.

Factors considered.

Finality of award.

Hand.

In general.

Leg.

Payment.

Rate applicable.

Survival of right when death unrelated to accident.

##### Eyes.

The use of corrective glasses, in the event of the loss of an eye, or other artificial means, should not, or might not be permitted to be taken into consideration in fixing specific indemnities, and in determining those specific indemnities the loss of earning power or capacity to work was not to be considered. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Where an employee lost an eye, there would not be deducted from the award therefor the amount paid to him because of his partial loss of vision, due to a former accident, on the theory that he did not suffer total loss of his eye in the accident which befell him for which he claimed compensation. The employee was entitled to the specific indemnity for loss of his eye by enucleation, even though the vision was impaired. *Leach v. Grangeville Hwy. Dist.*, 55 Idaho 307, 41 P.2d 618 (1935).

Married employee, with three minor children, who lost left eye entirely and 5.5 per cent vision of right eye was entitled to \$19.00 per week for 99 per cent of a period of 146.6 weeks. *Beard v. Lucky Friday Silver-Lead Mines*, 67 Idaho 135, 173 P.2d 76 (1946).

An employee who lost an eye by enucleation from an accident arising out of and in the course of his employment was entitled to 140 weeks compensation notwithstanding the fact that he had, prior to the accident, lost 90% of the vision in said eye. *Gentry v. Bano, Inc.*, 91 Idaho 790, 430 P.2d 681 (1967).

An employee who, prior to his injury was totally blind in his right eye and had 20% vision in his left eye corrected to 85% with glasses was, upon becoming wholly blind as the result of an industrial accident, entitled to total disability benefits of \$45.00 a week for 400 weeks with 120 weeks at \$30.00 a week to be paid by the employer and the remainder from special indemnity fund, the employer's

liability for loss of the sight of the left eye not being reduced by the fact that his vision prior to the accident, uncorrected by glasses was only 20%. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931 (1968).

##### Factors Considered.

An award of specific indemnity was grounded upon rating of partial permanent disability and monetary value of such rating; since both stemmed from the covered injury and could not be separated, if one aspect fell by reason of being incorrect, then the other must have fallen. *Hix v. Potlatch Forests, Inc.*, 88 Idaho 155, 397 P.2d 237 (1964).

In determining specific indemnities payable for permanent injuries, disability for work, loss of earning power, or capacity to work were not factors to be considered. *Hix v. Potlatch Forests, Inc.*, 88 Idaho 155, 397 P.2d 237 (1964).

The degree of claimant's partial permanent disability, residual of his permanent injury, must have been evaluated in terms of specific indemnity payable as for loss or comparative loss of bodily members, where medical evidence showed that claimant was surgically healed and able to return to light work, although suffering a partial permanent disability, residual of his covered injury. *Hix v. Potlatch Forests, Inc.*, 88 Idaho 155, 397 P.2d 237 (1964).

##### Finality of Award.

Award of board was held final, where board in reaching amount of award took into consideration all factors, such as condition physical and mental, past, present and future, the changing and progressive nature of the injury, and that he could no longer work as a logger, but could do light work; hence court on appeal would not say that board did not lawfully exercise its discretion. *McCall v. Potlatch Forests, Inc.*, 69 Idaho 410, 208 P.2d 799 (1949).



**Hand.**

It was proper for the board to award a claimant who sustained a traumatic amputation of the terminal phalanges of the index, middle, and ring fingers of his right hand compensation on the basis of the proportionate loss of the hand rather than the sum of the specific indemnities for the fingers mentioned. *Boxleitner v. St. Maries Plywood Co.*, 91 Idaho 852, 433 P.2d 122 (1967).

**In General.**

The statute provided for compensation on account of disability for work, except the specific indemnities for certain injuries, and was based upon the loss of earning power or capacity to earn. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

It was intention of the legislature to grant the indemnity for each specific injury in the law enumerated and comparable indemnities for other cases not enumerated in the statute, and each indemnity was intended to be separate and independent from every other indemnity. *Close v. General Constr. Co.*, 61 Idaho 689, 106 P.2d 1007 (1940).

The legislature must have intended, in fixing the schedule of indemnities, to take into consideration, in some measure, all of the elements, along with loss of earning power, including pain and suffering, going to make up the loss to a workman who lost a member of his body, in the course of his employment. *Close v. General Constr. Co.*, 61 Idaho 689, 106 P.2d 1007 (1940).

It was the major purpose and the general spirit and tenor of the provisions of the Workmen's Compensation Law, except where it provided for specific indemnities, that compensation was provided to make good for the loss or impairment of earning power resulting from injury and requiring industry to bear a burden which otherwise might have been cast upon the worker and his family. *Frisk v. Garrett Freightlines, Inc.*, 47 Idaho 507, 276 P.2d 964 (1954).

Unlike certain other states, our workmen's compensation law contained no provision for rating a partial permanent disability in terms of specific indemnity comparable to a percentage of total permanent disability or on basis of "the whole man." *Hix v. Potlatch Forests, Inc.*, 88 Idaho 155, 397 P.2d 237 (1964).

**Leg.**

Where an employee had a leg injury, for which he was paid compensation, and as a result of such injury, an amputation was thereafter necessary, and while the latter event was the result of accident and injury, compensation paid before amputation would not be taken into consideration in determining the indemnity for the loss of the leg. *Close v. General Constr. Co.*, 61 Idaho 689, 106 P.2d 1007 (1940).

Where claimant suffered burns to right foot and ankle when he accidentally stepped into a ladle holding molten iron, finding by commission of partial permanent disability equivalent to 10 per cent of the loss of the leg between the knee and ankle, would not be increased on appeal, where evidence sustained finding of commission. *Herman v. Coeur d'Alene Hdwe. & Foundry Co.*, 69 Idaho 423, 208 P.2d 167 (1949).

**Payment.**

Specific indemnity, for permanent injury less than total, was payable without limitation or condition in addition to all other compensation. *Peterson's Estate v. J.R. Simplot Co.*, 83 Idaho 120, 358 P.2d 587 (1961).

**Rate Applicable.**

Where first accident was aggravated by second accident which occurred after amendment in 1949, rate specified in 1949 amendment applied. *Oliver v. Potlatch Forests, Inc.*, 73 Idaho 45, 245 P.2d 775 (1952).

**Survival of Right When Death Unrelated to Accident.**

All losses for permanent injuries less than total disability caused by accident arising out of and in the course of employment, whether actual or comparable losses of named body members, constituted permanent injuries included within the purview of this statute and survived the death of injured workman dying from causes unrelated to the accident. *Peterson's Estate v. J.R. Simplot Co.*, 83 Idaho 120, 358 P.2d 587 (1961).

Survivability of a claim for specific indemnity for permanent injury was grounded upon actual or comparable loss or physical impairment and not upon loss of earning power or capacity to work. *Peterson's Estate v. J.R. Simplot Co.*, 83 Idaho 120, 358 P.2d 587 (1961).

**72-429. Unscheduled permanent disabilities.** — In all other cases of permanent disabilities less than total not included in the foregoing schedule the amount of income benefits shall be not less than the evaluation in relation to the percentages of loss of the members, or of loss of the whole man, stated against the scheduled permanent impairments, as the disabilities bear to those produced by the permanent impairments named in the schedule. Weekly income benefits paid pursuant to this section shall

likewise be paid at fifty-five percent (55%) of the average weekly state wage for the year of the injury as provided in section 72-428, Idaho Code. [I.C., § 72-429, as added by 1971, ch. 124, § 3, p. 422; am. 1997, ch. 274, § 8, p. 799.]

**72-430. Permanent disability — Determination of — Percentages — Schedule.** — (1) Matters to be considered. In determining percentages of permanent disabilities, account shall be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the afflicted employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

(2) Preparation of schedules — Availability for inspection — Prima facie evidence. The commission may prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries less than total, including, but not limited to, a schedule for partial loss of binaural hearing and for loss of teeth, and methods for determination thereof. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the percentages of permanent disabilities to be attributed to the injuries or diseases covered by such schedule. [I.C., § 72-430, as added by 1971, ch. 124, § 3, p. 422; am. 1982, ch. 231, § 5, p. 608.]

#### STATUTORY NOTES

**Compiler's Notes.** — Section 4 of S.L. 1982, ch. 231 is compiled as § 72-425.

#### JUDICIAL DECISIONS

##### ANALYSIS

Ability to compete in open labor market.  
Commission's findings.  
Compensable need.  
Disablement.  
Economic factor.  
Evaluation of permanent disability.  
Evidence.  
Labor market.  
Lost earning capacity.  
— Not shown.  
— Calculation.  
— Future wage increases.  
— Hourly wages.  
Medical factors.  
Nonmedical factors.



Odd-lot category.

—Evidence.

—Burden.

Pain.

Preexisting injury or impairment.

Reasonable geographic area.

Suitable work.

### **Ability to Compete in Open Labor Market.**

In its order denying the claimant's request to set aside the lump sum agreement, the industrial commission specifically mentioned claimant's age, level of education, and the working environment to which he had become accustomed; such references by the Commission clearly indicated that it was aware of those nonmedical factors affecting claimant's ability to compete in an open labor market. *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986).

Where the industrial commission found that claimant's later employment by Department of Parks was essentially the equivalent of work provided by a sympathetic employer or friend and this conclusion was supported by the record, the finding that claimant was odd-lot totally permanently disabled prior to her most recent injury and the total permanent disability did not result from combined effects was affirmed. *Bybee v. State, Indus. Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996).

### **Commission's Findings.**

If the Commission finds that the claimant has met his or her burden of proving 100% disability via the claimant's medical impairment and pertinent nonmedical facts, total and permanent disability has been established. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

### **Compensable Need.**

If the "personal and economic circumstances of the employee" at the time of the hearing do not reflect a compensable need, then the spirit of the workers' compensation law would not be served by awarding disability based on an antecedent, but no longer existing need; granted, there may be instances where a market other than the claimant's residence at the time of the hearing is relevant to the inquiry, and such determinations should be made on a case by case basis based in individual facts and circumstances. *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 870 P.2d 1292 (1994).

### **Disablement.**

The disablement referred to in the statute is the disablement that is caused by work-related injury; the statute cannot reasonably be read to refer to disablement that results from some nonwork-related injury or condi-

tion. *Horton v. Garrett Freightlines*, 151 Idaho 912, 772 P.2d 119 (1989).

### **Economic Factor.**

A 74% drop in worker's compensation claimant's earning potential as the result of an industrial accident was clearly an "economic" factor which should have weighed heavily in the industrial commission's evaluation of permanent disability. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

### **Evaluation of Permanent Disability.**

In evaluating permanent disability under § 72-425 and this section, all physical impairments that were caused by the work-related injury and by all pre-existing impairments or physical conditions should be taken into account; otherwise, there would be no determination of disability that would permit an apportionment for pre-existing impairments under §§ 72-406 and 72-332. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

Where worker, after work-related accident which affected his right hip, had a later injury to his left hip, shoulders, and back due to arthritis and spondylolisthesis, commission should have included the impairments to worker's left hip, his shoulders, and his back in making its evaluation of the degree of his total and permanent disability since the conditions that caused these impairments existed at the time of the injury to worker's right hip; whether any of these impairments led to liability of employer and its surety or the Industrial Special Indemnity Fund (ISIF) depended on apportionment under §§ 72-406 and 72-332. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

As the industrial commission correctly opined, the fact that claimant settled for a disability award based on twenty percent of the whole man, which is equal to his permanent impairment rating, did not indicate that he has been treated unfairly; whether a claimant has suffered a permanent disability greater than permanent physical impairment is determined by assessing whether the physical impairment, taken in conjunction with non-medical factors [this section], has reduced the claimant's capacity for gainful activity; the commission noted that at the time of the hearing in December 1988, claimant was employed at a higher hourly wage than he received in the same position prior to the

1985 accidental injury, and therefore did not have a reduced capacity to engage in gainful activity. *Matthews v. Department of Cors.*, 121 Idaho 680, 827 P.2d 693 (1992).

Where claimant was struck in the left eye by a metal fragment which necessitated the removal of his natural lens and the implant of an artificial lens, the fact that the long-term medical effects of such lens are unknown, that there are medical risks and potential complications which arise from such lens implantation, that claimant experienced glare caused by the lens and experienced headaches, eye fatigue and more problems with debris in this eye than before the implant and had to wear bifocals to focus on close objects because his left eye would only focus at a distance, are medical in nature and relate to the degree of permanent impairment and not to the degree of permanent disability, and thus cannot be considered to increase his permanent disability. *Burke v. EG & G/Morrison-Knudsen Constr. Co.*, 126 Idaho 413, 885 P.2d 372 (1994).

#### **Evidence.**

Where Commission found that claimant suffered from a disability of 85% of the whole person and the finding was supported by competent evidence and not disputed by claimant, claimant failed to establish that he was totally and permanently disabled since his disability rating was less than 100%. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

#### **Labor Market.**

An out-of-state city was erroneously considered as a potential labor market in determining a worker's compensation claimant's disability where the city was 129 miles away, over and across a high mountain pass, where the claimant's expected income had dropped 74%, and where working in the out-of-state city would have required worker to leave his home and find living quarters in that city. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

#### **Lost Earning Capacity.**

##### **—Not Shown.**

The industrial commission concluded that although the employee did suffer a 1% impairment due to sensory loss, this impairment did not decrease his wage-earning capacity because he was able to work without restriction in his regular occupations; therefore, he did not suffer any disability in excess of his impairment, and the pertinent nonmedical factors of this section, such as the employee's limited education and his inability to speak or understand English, never became relevant. *Rivas v. K.C. Logging*, 134 Idaho 603, 7 P.3d 212 (2000).

##### **—Calculation.**

In determining a claimant's permanent partial disability, the industrial commission is not required to utilize pre-injury and post-injury annual earnings, rather than looking to hourly wages. *McClurg v. Yanke Mach. Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

##### **—Future Wage Increases.**

Claim that the industrial commission should have considered wage increases implemented by claimant's former employer during the interim between his injury and subsequent employment with another employer was unsupported by law and too speculative as it could not be ascertained whether claimant would have continued working for former employer, or whether he would have received the same raises that current employees received. *McClurg v. Yanke Mach. Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

Probable future wage increases are speculative and unsupported by law unless the claimant is performing the act being used as the test pre-injury and post-injury; thus, where claimant's employment activity changed after he was injured, any future wage increases that he may have received had he remained in his pre-injury employment activity were unascertainable and irrelevant. *Reiher v. American Fine Foods*, 126 Idaho 58, 878 P.2d 757 (1994).

##### **—Hourly Wages.**

The industrial commission's comparison of claimant's hourly wages to assist in its determination of his lost earning capacity was proper where the numbers it relied upon to represent the loss of earning capacity were supported by substantial competent evidence. *McClurg v. Yanke Mach. Shop, Inc.*, 123 Idaho 174, 845 P.2d 1207 (1993).

##### **Medical Factors.**

Where worker, after a work-related accident which affected his right hip, had a later injury to his left hip, shoulders, and back caused by arthritis and spondylolisthesis, physical conditions such as those that caused the impairments to worker's left hip, his shoulders, and his back were not nonmedical factors but medical factors; commission was correct in not considering these factors under this section. *Horton v. Garrett Freightlines*, 115 Idaho 912, 772 P.2d 119 (1989).

##### **Nonmedical Factors.**

It was not error for the commission to conclude that a claimant's physical appearance and history of excessive alcohol consumption constituted pertinent nonmedical factors under § 72-425 and this section, rather than physical impairments under either § 72-332 or § 72-406, where the indus-



trial commission found that claimant's physical appearance and history of excessive alcohol consumption did not hinder him in his earning capacity prior to the accident, where, since he was a teenager claimant had functioned in the manual labor market without suffering any loss of potential earning capacity, and where claimant's physical appearance and history of excessive alcohol consumption had not served as a hindrance in that job market. *Roberts v. Asgrow Seed Co.*, 116 Idaho 209, 775 P.2d 101 (1989).

The Carey formula which was adopted by the Supreme Court in *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984), applies in Industrial Special Indemnity Fund cases and should not be mechanically applied to all nonmedical apportionment issues; therefore, where the industrial commission applied the Carey formula to apportion employee's disability caused by nonmedical factors, its decision was vacated. *Weygint v. J.R. Simplot Co.*, 123 Idaho 200, 846 P.2d 202 (1993).

In awarding claimant permanent partial impairment of fifty percent of the left eye where, because of being hit in the left eye by a metal fragment, surgical removal of the claimant's natural lens and the implanting of an artificial lens was required, commission's consideration of such nonmedical factors as claimant's educational background, his vocational training, his employment after the injury, and the status of the economy and the construction industry in the locale of his residence in determining the degree of permanent disability was proper, and evidence supported the finding that the nonmedical factors did not increase claimant's permanent partial disability and that such disability did not exceed his permanent physical impairment rating. *Burke v. EG & G/Morrison-Knudsen Constr. Co.*, 126 Idaho 413, 885 P.2d 372 (1994).

Industrial commission properly considered a worker's alcoholism as a nonmedical factor in determining that the worker was only 50 percent disabled. *Ball v. Daw Forest Prods. Co.*, 136 Idaho 155, 30 P.3d 933 (2001).

### **Odd-lot Category.**

Where a claimant demonstrates that he fits within the definition of an odd-lot worker he has proven total and permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

### **—Evidence.**

A claimant may establish a prima facie case of odd-lot disability status as a matter of law only if the evidence is undisputed and is reasonably susceptible to only one interpretation. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant sought compensation for

total and permanent disability under the definition of odd-lot worker and the evidence of claimant's vocational expert was that claimant was not capable of performing any type of job, but company's expert was of the opinion that even with claimant's partial disability there were still jobs he could perform, the questions of whether claimant was an odd-lot worker became a question of fact for the Commission to decide. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Where claimant sought permanent disability under the odd-lot status and there was conflict between testimony of claimant's vocational counselor that claimant was not capable of performing any job and the testimony of company's vocational expert that claimant was suitable for several types of jobs, since Commission found the testimony of company's vocational expert to be more credible and persuasive, claimant's claim was denied and claimant's argument that company expert's evaluation should not be persuasive because there are no specific jobs available in the categories for which she found him to be qualified was without merit, for it has never been held that unless a prima facie case of odd-lot disability is established, an employer or ISIF must prove that there is a specific job in existence in order to defeat a claim for total or permanent disability. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

### **—Burden.**

Where claimant for total disability failed to show that he had attempted other types of employment, that he did little to find work after leaving company, met with his vocational counselor only once, inquired about only a few jobs, and never sought employment in the area, and there was a conflict in the evidence about whether attempts to find employment would have been futile, he failed to establish odd-lot worker status. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

An employee may prove total disability under the odd-lot worker doctrine in one of three ways: 1. by showing that he has attempted other types of employment without success; 2. by showing that he or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; 3. by showing that any efforts to find suitable employment would be futile. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

The burden of proving a prima facie case of odd-lot status is on the claimant; however, where a dispute exists as to the extent of disability, the type of work the claimant is capable of performing, and the effort made to



find suitable employment, whether the claimant is odd-lot status is a factual determination within the discretion of the commission. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

#### **Pain.**

Although medical panels did not specifically designate a portion of the impairment rating as based solely on pain, the reports of both panels clearly took into account claimant's past complaints of pain; thus, there was competent evidence supporting the industrial commission's finding that pain was a component of the impairment rating. *Pomerinke v. Excel Trucking Transport*, 124 Idaho 301, 859 P.2d 337 (1993).

#### **Preexisting Injury or Impairment.**

Where the evidence showed that the claimant suffered a heart attack during the course of his employment, but the only evidence presented to the industrial commission in support of its determination that the claimant suffered a permanent partial impairment of 50 percent of the whole person failed to consider a preexisting heart condition, such determination was not supported by the evidence. *Johnson v. Amalgamated Sugar Co.*, 108 Idaho 765, 702 P.2d 803 (1985).

Evidence supported industrial commission's finding that although claimant was found to have a permanent disability of 30% of the whole person after his second injury, because most of his limitations existed prior to the second injury, the portion of claimant's disability resulting from the second injury did not exceed the portion of the physical impairment rating of five percent attributable to that injury; the remainder of claimant's dis-

ability rating accrued prior to the 1989 injury, thus insurer was not liable for that portion. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

#### **Reasonable Geographic Area.**

The literal wording, the general rules of statutory interpretation, prior case law, and the underlying purpose of this section, all suggest that, under subsection (1) of this section, the industrial commission should consider the market in which a claimant resides at the time of the hearing as the axis from which the scope of a "reasonable geographic area" is defined. *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 870 P.2d 1292 (1994).

#### **Suitable Work.**

Where the plaintiff's injury to his neck, which occurred while loading timber onto a truck, resulted in a disability of 15 percent of the whole man, a finding supported by both competent medical and nonmedical evidence, he was not entitled to benefits for a total disability simply because he could not perform adequately in his previous job as a truck driver, since he had not shown there was no suitable occupation open to him. *Gordon v. West*, 103 Idaho 100, 645 P.2d 334 (1982).

**Cited in:** *Fenich v. Boise Elks Lodge No. 310*, 106 Idaho 550, 682 P.2d 91 (1984); *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986); *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987); *Graybill v. Swift & Co.*, 115 Idaho 293, 766 P.2d 763 (1988); *Vassar v. J.R. Simplot Co.*, 134 Idaho 495, 5 P.3d 475 (2000); *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 38 P.3d 617 (2001).

**72-431. Inheritability of scheduled or unscheduled income benefits.** — When an employee who has sustained disability compensable as a scheduled or unscheduled permanent disability less than total, and who has filed a valid claim in his lifetime, dies from causes other than the injury or occupational disease before the expiration of the compensable period specified, the income benefits specified and unpaid at the employee's death, whether or not accrued or due at the time of his death, shall be paid, under an award made before or after such death, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this subsection and in the order named:

(1) To the dependent widow or widower, if there is no child under the age of eighteen (18) or child incapable of self-support; or

(2) If there are both such a widow or widower and such a child or children, one-half (½) to such widow or widower and the other one-half (½) to such child or children; or

(3) If there is no such widow or widower but such a child or children, then to such child or children; or

(4) If there is no survivor in the above classes, then to the personal representative of the decedent. [I.C., § 72-431, as added by 1971, ch. 124, § 3, p. 422.]

### JUDICIAL DECISIONS

#### Construction With Other Law.

The focus in § 72-332 is on the employer's liability for payment of income benefits, as distinguished from the focus in this section, which is on the employee's disability. This section, governing the inheritability of income benefits, applies only if an employee has sustained a disability less than total. This section

does not require consideration of how the total permanent disability benefits are paid, or by whom and is specific in referring only to whether or not the employee receives a total permanent disability award. *Palomo v. J.R. Simplot Co.*, 131 Idaho 314, 955 P.2d 1093 (1998).

### DECISIONS UNDER PRIOR LAW

#### Death of Claimant.

An award under the statute providing specific indemnities for certain injuries was "in the nature of liquidated damages" and, though unassignable under the statute, survived death of employee. *Haugse v. Sommers Bros. Mfg. Co.*, 43 Idaho 450, 254 P. 212 (1927); *Leach v. Grangeville Hwy. Dist.*, 55 Idaho 307, 41 P.2d 618 (1935).

A claim survived the death of claimant. *Thacker v. Jerome Co-op. Creamery*, 61 Idaho 726, 106 P.2d 863 (1940).

As to scheduled relief, the award became liquidated damages in a final definite amount. It inured to the employee and not to his dependents. It was not compensation for disability, which otherwise might have ceased with his death. The right thereto, though not

determined, became fixed at the time of the accident. An award was properly recoverable by the deceased workman's representative. Such claim was not in any sense a death claim. *Mahoney v. Payette*, 64 Idaho 443, 133 P.2d 927 (1943).

Compensation was denied a widow for the death of her husband, who had sustained a compensable injury which required his left arm to be placed in plaster cast, and he was drowned when a boat capsized, while fishing. *Linder v. Payette*, 64 Idaho 656, 135 P.2d 440 (1943).

An award for an accrued claim by employee's administrator was not res judicata of claim by employee's dependents. *Linder v. Payette*, 64 Idaho 656, 135 P.2d 440 (1943).

### 72-432. Medical services, appliances and supplies — Reports. —

(1) Subject to the provisions of section 72-706, Idaho Code, the employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital services, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer.

(2) The employer shall also furnish necessary replacements or repairs of appliances and prostheses, unless the need therefor is due to lack of proper care by the employee. If the appliance or prosthesis is damaged or destroyed in an industrial accident, the employer, for whom the employee was working at the time of accident, will be liable for replacement or repair, but not for any subsequent replacement or repair not directly resulting from the accident.

(3) In addition to the income benefits otherwise payable, the employee who is entitled to income benefits shall be paid an additional sum in an amount as may be determined by the commission as by it deemed necessary,



as a medical service, when the constant service of an attendant is necessary by reason of total blindness of the employee or the loss of both hands or both feet or the loss of use thereof, or by reason of being paralyzed and unable to walk, or by reason of other disability resulting from the injury or disease actually rendering him so helpless as to require constant attendance. The commission shall have authority to determine the necessity, character and sufficiency of any medical services furnished or to be furnished and shall have authority to order a change of physician, hospital or rehabilitation facility when in its judgment such change is desirable or necessary.

(4)(a) The employee upon reasonable grounds, may petition the commission for a change of physician to be provided by the employer; however, the employee must give written notice to the employer or surety of the employee's request for a change of physicians to afford the employer the opportunity to fulfill its obligations under this section. If proper notice is not given, the employer shall not be obligated to pay for the services obtained. Nothing in this section shall limit the attending physician from arranging for consultation, referral or specialized care without permission of the employer. Upon receiving such written notice, the employer shall render its written decision on the claimant's request within fourteen (14) days. If any dispute arises over the issue of a request for change of physician, the industrial commission shall conduct an expedited hearing to determine whether or not the request for change of physician should be granted, and shall render a decision within fourteen (14) days after the filing of the response by the employer.

(b) The industrial commission shall, no later than December 31, 1997, promulgate a rule for the expeditious handling of a petition for change of physician pursuant to this section. Nothing herein shall prevent the commission from making periodic amendments, as may become necessary, to any rule for a petition for change of physician.

(5) Any employee who seeks medical care in a manner not provided for in this section, or as ordered by the industrial commission pursuant to this section, shall not be entitled to reimbursement for costs of such care.

(6) No provider shall engage in balance billing as defined in section 72-102, Idaho Code.

(7) An employee shall not be responsible for charges of physicians, hospitals or other providers of medical services to whom he has been referred for treatment of his injury or occupational disease by an employer designated physician or by the commission, except for charges for personal items or extended services which the employee has requested for his convenience and which are not required for treatment of his injury or occupational disease.

(8) The employer or surety shall not be subject to tort liability to any health care provider for complying with the provisions of this law.

(9) Nothing in this chapter shall be construed to require a workman who in good faith relies on Christian Science treatment by a duly accredited Christian Science practitioner to undergo any medical or surgical treatment, providing that neither he nor his dependents shall be entitled to income benefits of any kind beyond those reasonably expected to have been



paid had he undergone medical or surgical treatment, and the employer or insurance carrier may pay for such spiritual treatment.

(10) The commission shall promulgate rules requiring physicians and other practitioners providing treatment to make regular reports to the commission containing such information as may be required by the commission. The commission shall promulgate such rules with the counsel, advice, cooperation and expertise of representatives of industry, labor, sureties and the legal and medical professions as well as institutions, hospitals and clinics having physical rehabilitation facilities.

(11) All medical information relevant to or bearing upon a particular injury or occupational disease shall be provided to the employer, surety, manager of the industrial special indemnity fund, or their attorneys or authorized representatives, the claimant, the claimant's attorneys or authorized representatives, or the commission without liability on the part of the physician, hospital or other provider of medical services and information developed in connection with treatment or examination for an injury or disease for which compensation is sought shall not be privileged communication. When a physician or hospital willfully fails to make a report required under this section, after written notice by the commission that such report is due, the commission may order forfeiture of all or part of payments due for services rendered in connection with the particular case. An attorney representing the employer, surety, claimant or industrial special indemnity fund shall have the right to confer with any health care provider without the presence of the opposing attorney, representative or party, except for a health care provider who is retained only as an expert witness.

(12) Physicians or others providing services under this section shall assist in the rehabilitation program provided in section 72-501A, Idaho Code. They shall cooperate with specialists from the commission's rehabilitation staff and with employer rehabilitation personnel in furthering the physical or vocational rehabilitation of the employee. The extension of total temporary disability benefits during retraining as authorized by section 72-450, Idaho Code, shall be the responsibility of the commission, however, the physician shall inform the commission as soon as it is medically apparent that the employee may be unable to return to the job in which he sustained injury or occupational disease following treatment and maximum recovery.

(13) An injured employee shall be reimbursed for his expenses of necessary travel in obtaining medical care under this section. Reimbursement for transportation expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel.

(14) An employee who leaves the locality where employed at the time of the industrial accident, or manifestation of an occupational disease, or the locality in which the employee is currently receiving medical treatment for the injury, shall give timely notice to the employer and surety of the

employee's leaving the locality. The employer or surety may require the claimant to report to the treating physician for examination prior to leaving the locality, if practical. If an examination by the treating physician is not practical prior to leaving the locality, the employer or surety may assist in arranging an examination by an appropriate physician in the new locality. After receiving notice of relocation, the employer or surety shall have the same responsibility to furnish care as set forth in subsection (1) of this section. [I.C., § 72-432, as added by 1971, ch. 124, § 3, p. 422; am. 1971, ch. 297, § 1, p. 1113; am. 1974, ch. 132, § 4, p. 1329; am. 1978, ch. 264, § 12, p. 572; am. 1997, ch. 274, § 9, p. 799; am. 2005, ch. 161, § 1, p. 493; am. 2006, ch. 206, § 2, p. 627.]

### STATUTORY NOTES

**Cross References.** — Accessibility of medical and hospital facilities, one criterion in fixing premium rates in state insurance fund, § 72-913.

**Amendments.** — The 2006 amendment, by ch. 206, added subsection (6) and redesignated the remaining subsections accordingly.

### JUDICIAL DECISIONS

#### ANALYSIS

Burden of proof.  
Change of physician.  
Construction with other statutes.  
Duty of employer.  
Limitation period for payment.  
Medical expenses.  
—Direct payment.  
—Responsibility.  
Payment of medical benefits.  
Presumptions of commission.  
Reasonable treatment.

#### Burden of Proof.

The industrial commission found that claimant was not entitled to payment, pursuant to subsection (1) of this section, because no evidence indicated that the bills were directly incurred as a result of his 1985 back injury; the commission correctly concluded that claimant failed to carry his burden of establishing that the medical bills arose as a result of his initial back injury in 1985 and that claimant failed to meet his burden of establishing that any expenses for prescription medication were incurred due to his 1985 industrial accident. *Matthews v. Department of Cors.*, 121 Idaho 680, 827 P.2d 693 (1992).

Issue at the employee's second workers' compensation hearing was whether her need for neck surgery was caused by her industrial accident. The reasonableness of such medical care was not at issue and the Workers' Compensation Commission did not err in requiring that she prove a causal connection between her industrial accident and the need for her neck surgery. *Henderson v. McCain Foods*, — Idaho —, 130 P.3d 1097 (2006).

#### Change of Physician.

This statute sets forth a two-step process by which an employee may seek treatment from another physician without a referral from the attending physician. First, the employee must ask the employer or its surety to authorize a change of physicians; upon the denial of that request, the employee can petition the industrial commission for permission to change physicians. *Quintero v. Pillsbury Co.*, 119 Idaho 918, 811 P.2d 843 (1991).

This section does not specify when the petition to the commission for a change of physician is to be made. All that it requires is that the employee must first give the employer the opportunity to authorize the change in physicians and if that request is denied then the employee can petition the commission. While an employee risks being liable for the costs of unauthorized treatments undertaken without commission or employer approval, nothing in the statute prohibits petitioning for approval of the commission after the treatment is completed if the employee can show compliance with the statute. *Quintero v. Pillsbury Co.*,



119 Idaho 918, 811 P.2d 843 (1991).

Amendments to subsection (4) achieve the following: (1) require written notice to an employer or surety prior to petitioning the Idaho industrial commission for a change of physician; (2) provide for an expedited hearing and decision; and (3) direct the commission to promulgate rules for handling of petitions; to the extent that case law stands for the proposition that subsection (4) does not require written notice, the 1997 amendment to the statute supersedes it. *Seward v. Pac. Hide & Fur Depot*, 138 Idaho 509, 65 P.3d 531 (2003).

Employee's written claim for benefits was a "claim" for the purposes of § 72-706(1); while the claim was filed prior to the employee's visits to a new physician, the surety became aware of the new physician's involvement through correspondence prior to the hearing, and this knowledge, combined with the claim, gave the employer and surety time to pay for the treatment, and thus the employee effectively petitioned the Idaho industrial commission for a change of physician pursuant to subsection (4). *Seward v. Pac. Hide & Fur Depot*, 138 Idaho 509, 65 P.3d 531 (2003).

Industrial commission erred in holding that claimant, who sought medical benefits for a second surgery, was required to seek permission for a change of physician once his employer wrongfully ceased providing medical care as required by subsection (1); the second surgery was reasonably required and was needed as a consequence of claimant's work-related injury. *Reese v. V-1 Oil Co.*, 141 Idaho 630, 115 P.3d 721 (2005).

### **Construction With Other Statutes.**

Because subsection (1) of this section is more specific with respect to medical and surgical coverage for occupational diseases than § 72-437, and the scope of the benefits addressed within subsection (1) is more narrowly focused than that of § 72-437, the "compensation" contemplated under § 72-437 includes income benefits, medical and related benefits, and medical services, while subsection (1) restricts its focus to medical services only. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000).

It is clear that subsection (1) of this section was intended to address medical and surgical benefits for claimants manifesting an occupational disease, while § 73-437 was intended to address a claimant's entitlement to benefits for lost income and other compensation; therefore, where a claimant seeks compensation for an occupational disease, benefits for medical services, appliances and supplies are to be determined according to this section, and all other forms of compensation claimed for an occupational disease are to be determined pursuant to § 72-437. *Mulder v. Lib-*

*erty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000).

### **Duty of Employer.**

An employer or surety may investigate a workmen's compensation claim to assure itself that it was obligated to consent to or authorize treatment. *Troutner v. Traffic Control Co.*, 97 Idaho 525, 547 P.2d 1130 (1976).

The language of this section is mandatory; it requires the employer to provide his injured employee medical care as needed or requested within a reasonable time after an occupational injury. *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979).

The mandate of this section requires the employer to pay for the costs of reasonable medical treatment required by the employee's physician. *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

By this statute, the employer is mandatorily required to provide injured employees with medical care when they qualify for workers' compensation. *St. Alphonsus Reg'l Med. Ctr. v. Edmondson*, 130 Idaho 108, 937 P.2d 420 (1997).

### **Limitation Period for Payment.**

Because medical benefits are included in the definition of compensation under § 72-102(6), the payment of medical benefits under subsection (1) of this section must be taken into account under § 72-706(2) to determine whether compensation was being paid when the limitation period provided in § 72-706(2) expired. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

With regard to whether an employee is entitled to compensation in the form of medical benefits after the expiration of the limitation period in § 72-706(2), the more specific provisions of subsection (1) of this section control over § 72-706(2). *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

### **Medical Expenses.**

#### **—Direct Payment.**

Nothing in this section requires direct payment by a workers' compensation surety to a health care provider. *St. Alphonsus Reg'l Med. Ctr. v. Edmondson*, 130 Idaho 108, 937 P.2d 420 (1997).

When an employer provides medical services itself or through a contract with a medical provider, the employer becomes directly obligated to the provider for medical expenses; this obligation occurs not because the statute requires direct payment, but because the employer has chosen to provide medical services by these means. *St. Alphonsus Reg'l Med. Ctr. v. Edmondson*, 130 Idaho 108, 937 P.2d 420 (1997).



### —Responsibility.

Where claimant failed to provide notice to his employer or surety that he was seeing a different physician than the one provided by the employer, the industrial commission correctly concluded that employer's surety was not liable for expenses incurred in seeing the new physician. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 714 P.2d 36 (1986).

### Payment of Medical Benefits.

As to when medical benefits must be paid, subsection (1) of this section takes precedence over subsection (2) of § 72-706, which deals generally with all matters of compensation. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

### Presumptions of Commission.

When a doctor has expressly or impliedly suggested a method of treating an injured employee to the employer or surety and the treatment has not been furnished, and when the employee was unaware that the treatment might be beneficial and the employer or surety did not so inform the employee within a reasonable time, it was appropriate for the commission to presume that the treatment did offer a prospect for improving the injured employee's condition. *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979).

### Reasonable Treatment.

This section obligates the employer to provide treatment if the employee's physician requires the treatment and if the treatment is reasonable. It is for the physician, not the commission, to decide whether the treatment

is required. The only review the commission is entitled to make of the physician's decision is whether the treatment was reasonable. *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

In light of the facts that: a) A worker's compensation claimant made gradual improvement from treatment received; b) the treatment was required by the claimant's physician; and c) the treatment received was within the physician's standard of practice the charges for which were fair, reasonable and similar to charges in the same profession, a legal conclusion that the treatment was unreasonable under this section could not stand. *Sprague v. Caldwell Transp., Inc.*, 116 Idaho 720, 779 P.2d 395 (1989).

The commission found that the surgery was reasonable and the finding was supported by substantial evidence where the employee's physician testified that surgery was required to treat the carpal tunnel syndrome in the employee's left hand, and for the purposes of subsection (1) of this section, medical treatment is reasonable if the employee's physician requires the treatment, and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000).

**Cited in:** *Rhodes v. Sunshine Mining Co.*, 113 Idaho 162, 742 P.2d 417 (1987); *Westmark Fed. Credit Union v. Smith*, 116 Idaho 474, 776 P.2d 1193 (1989); *Hipwell v. Challenger Pallet & Supply*, 859 P.2d 330 (1993); *Figueroa v. ASARCO, Inc.*, 126 Idaho 602, 888 P.2d 381 (1994); *Adams v. Caribou Mem. Hosp.*, 126 Idaho 1022, 895 P.2d 1215 (1995); *Jarvis v. Rexburg Nursing Ctr.*, 136 Idaho 579, 38 P.3d 617 (2001).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Amount allowed.  
Board — powers.  
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Death after treatment.  
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Refusal by employee.  
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Treatment as payment of compensation.  
"Treatment" defined.

### **Amount Allowed.**

The board's determination that the amount allowed claimant for pain-killer medicine represented a reasonable amount would not be disturbed on appeal since there was ample evidence to support such findings even though the board did state that claimant took more drugs than he actually needed. *Hamilton v. Boise Cascade Corp.*, 84 Idaho 209, 370 P.2d 191 (1962).

### **Board — Powers.**

Board should have fixed fees for three classes of hospital service on a community basis. *In re Idaho Hosp. Ass'n*, 73 Idaho 320, 251 P.2d 538 (1952).

Board had exclusive, general, and comprehensive authority to fix rates charged by hospitals for services rendered patients receiving compensation. *In re Idaho Hosp. Ass'n*, 73 Idaho 320, 251 P.2d 538 (1952); *In re Idaho Hosp. Ass'n*, 76 Idaho 34, 277 P.2d 287 (1954).

Review of order of board fixing medical rates was limited to questions of law. *In re Idaho Hosp. Ass'n*, 76 Idaho 34, 277 P.2d 287 (1954).

Hospital had right to appeal from order of board fixing medical rates. *In re Idaho Hosp. Ass'n*, 76 Idaho 34, 277 P.2d 287 (1954).

Board's order fixing rates and charges for hospitals in the state was not arbitrary where it divided state into seven areas and differentiated between various hospitals in each area. *In re Idaho Hosp. Ass'n*, 76 Idaho 34, 277 P.2d 287 (1954).

Order of board which approved in some instances rates less than the regular charge of the hospital did not show that the board abused its authority to regulate rates. *In re Idaho Hosp. Ass'n*, 76 Idaho 34, 277 P.2d 287 (1954).

The board did not err in refusing to order the surety to pay drug bills when it appeared that the items were purchased subsequent to the time when workman was found to be surgically healed, further there being no evidence showing that the workman had requested the surety to furnish the items in question. *Lane v. General Tel. Co.*, 85 Idaho 111, 376 P.2d 198 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

### **Construction.**

The provisions of the Workmen's Compensation Law were to be liberally construed in favor of employees. *Burch v. Potlatch Forests, Inc.*, 82 Idaho 323, 353 P.2d 1076 (1960).

### **Death after Treatment.**

Medical and hospital expenses paid hereunder on account of an injured workman were not deductible from compensation payable to the state upon his death. *State ex rel. Wright*

*v. C.C. Anderson Co.*, 65 Idaho 400, 145 P.2d 237 (1944).

### **Domiciliary Nursing Care.**

Domiciliary nursing care was an integral portion of service in a case such as this where claimant injured his right hip at his employment so severely as to necessitate care, being confined to his bed for a long period of time before his removal to the Elks Rehabilitation Center where he was able to care only for his basic necessities of life. *Hamilton v. Boise Cascade Corp.*, 84 Idaho 209, 370 P.2d 191 (1962).

### **Duty of Employer.**

Among the primary duties of an employer to an injured workman was to furnish him reasonable medical, surgical or other treatment necessary to rehabilitate him and as far as possible restore his health, usefulness and earning capacity. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

Where claimant had suffered an amputated leg and required a prosthesis which would periodically need repair and replacement throughout his lifetime, such future repairs and replacements were the duty of the employer. *Rohnert v. Amalgamated Sugar Co.*, 95 Idaho 763, 519 P.2d 432 (1974).

### **Employee's Failure to Accept Treatment.**

Where the employer had made adequate medical treatment available to the employee, but the employee sought medical treatment elsewhere without notifying employer or his surety, the employer and the surety were not liable for the additional medical expenses. *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

### **Employer's Failure to Provide Treatment.**

If the employer fails to provide reasonable medical and similar services to the injured employee, the latter may do so at the employer's expense. *Larson v. State*, 79 Idaho 446, 320 P.2d 763 (1958); *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

### **Hospitals.**

Hospital association and its surety was liable for medical treatment, medicine, and medical treatment for the life of the injured employee, where the employee as the result of an industrial injury became a paraplegic, which was accompanied by pressure sores, and which caused an acute chronic bladder infection. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

### **Liability of Employer.**

Where employee waived the statutory requirement as to the employer providing med-



ical treatment for injuries, and entered into a contract providing for hospital benefits and accommodations, as was authorized by the statutes, the employer and his surety were relieved from all liability for hospitalization, medical and surgical treatment, and other care and attendance. *Flock v. J.C. Palumbo Fruit Co.*, 63 Idaho 220, 118 P.2d 707 (1941); *Epperson v. Texas-Owyhee Mining & Dev. Co.*, 63 Idaho 251, 118 P.2d 745 (1941).

The liability of the employer for medical, hospital and surgical attendance is primary, and such liability was not discharged until he had discharged his liability by contract or by performance. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

The obligation to furnish an injured employee with medical attendance for a reasonable time was construed by looking at the statute, the contract, and the facts and circumstances of the particular case. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

#### **Limitation of Actions.**

Even though four years from date of accident to file application for modification of award were allowed, claimant would not be entitled to recover compensation for hospital and medical care received on an application filed more than five years after the date of injury. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

The four-year limitation period did not apply to cases requiring medical attention and cases of total and permanent disability. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

Where a claimant was compensated for an injury to his elbow, but subsequently reinjured the elbow and contracted degenerative arthritis requiring corrective surgery, he could recover compensation for medical and surgical expenses despite a lapse of four years and 10 months between the first injury and notice to the employer of the second compensation claim. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

Where a claimant was compensated for a back injury but experienced increasing pain and requested compensation for corrective surgery more than five years after the accident, he was entitled to recover compensation for medical and surgical expenses under this section. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

#### **Malpractice.**

An employee's remedy for the alleged damage to his body was not limited to the recovery of compensation as provided by the Workmen's Compensation Law but he might maintain an action against the doctor for malpractice. *Hancock v. Halliday*, 65 Idaho 645, 150 P.2d 137 (1943), appeal after remand, 67 Idaho 119, 171 P.2d 333 (1946). *Contra*, *Roman v. Smith*, 42 F.2d 931 (D. Idaho 1930).

#### **Operation.**

Where the employee had fully recovered from the effects of a compensable accident suffered by him, and the removal of a kidney was not made necessary by reason of such injury, the expenses of the operation and compensation until surgically healed were denied. *Cole v. Fruitland Canning Ass'n*, 64 Idaho 505, 134 P.2d 603 (1943).

#### **Order to Pay.**

Where throughout proceedings before the commission the employer had continually denied all medical and hospital expenses incurred in the treatment of claimant and refused to pay them, following the commission's order requiring employer to pay all such expenses, no further action or notice on behalf of claimant was necessary to obtain reimbursement for any allowable expenses reasonably related to the injury. *Brooks v. Duncan*, 96 Idaho 579, 532 P.2d 921 (1975).

#### **Reasonable Time.**

Generally a "reasonable time" was as long as the condition and necessity for treatment existed. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

In determining what was a "reasonable time" for claimant to receive medical treatment and supplies, it was necessary to look to the statute and the facts and circumstances of the particular case. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

The nature or extent of disability was not determinative of an injured employee's right to the attendance provided for, but it was the necessity for such service that controlled. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

Where claimant had submitted to repeated examinations but prior to 1960 no one knew for certain the cause of his distress and symptoms and where two days after submitting to a myelogram by which his condition was correctly diagnosed the laminectomy was performed relieving claimant's condition, such surgery was not unreasonably belated although the injury had occurred more than five years previously in view of the fact that his physician and consultants and examining specialists previously consulted had not found sufficient evidence to make a like diagnosis. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

"Reasonable time" was not necessarily limited to the period of specific indemnity payments and it was not error for the board to order payment of medical expenses up to the date of the hearing and to hold in abeyance for subsequent determination the matter of responsibility for any further medical expense that might subsequently have been necessary. *Cox v. Intermountain Lumber Co.*, 92 Idaho 197, 439 P.2d 931 (1968).

This section is intended to control the period within which an employer shall provide an injured employee with medical treatment and that period is for a reasonable time following the injury. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

#### **Reasonable Treatment and Service.**

Reasonable medical and surgical treatment required exercise of ordinary care and skill in light of present day learning and enlightenment on subject. *Johnston v. A.C. White Lumber Co.*, 37 Idaho 617, 217 P. 979 (1923).

In determining whether claimant was furnished reasonable medical, surgical and hospital service, attention had to be given to diagnosis made and treatment given. *Johnston v. A.C. White Lumber Co.*, 37 Idaho 617, 217 P. 979 (1923).

Employer had duty to furnish reasonable medical treatment, but claimant was not entitled to treatment at a particular clinic of his own choosing. *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949).

Employer had duty to furnish an injured employee with reasonable medical, surgical, and other treatment, which would restore employee as near as possible to his original health, condition, and earning capacity. *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949); *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

Patient receiving compensation was entitled to reasonable adequate hospital care, and if he desired service in addition to reasonable care he had to stand the extra expense. In re *Idaho Hosp. Ass'n*, 73 Idaho 320, 251 P.2d 538 (1952).

The need for medical attention was not incompatible with the status of total and permanent disability, and necessary medical treatment may have been provided for in awards for compensation for total and permanent disability. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

Treatment was employed to indicate all steps taken in order to effect a cure of an injury or disease. *Burch v. Potlatch Forests, Inc.*, 82 Idaho 323, 353 P.2d 1076 (1960).

Where doctor's evaluation of appellant's permanent partial disability was made based upon the assumption that extracted teeth would be replaced by fixed bridge and industrial accident board adopted such evaluation as basis for award and expert testimony established that replacement for extracted teeth would be advisable, order denying replacement was reversed. *Burch v. Potlatch Forests, Inc.*, 82 Idaho 323, 353 P.2d 1076 (1960).

#### **Refusal by Employee.**

Finding that claimant who had suffered a back injury was not unreasonable in refusing

recommended surgery in favor of conservative treatment, was sustained where substantial, though somewhat conflicting evidence showed that he had suffered a similar injury 9 years before, had made the same choice, and that the choice had been a good one, enabling him to work almost ten more years. *Earl v. Swift & Co.*, 93 Idaho 546, 467 P.2d 589 (1970).

#### **Rights of Employee.**

Where claimant did not receive proper treatment from physician provided, he was justified in seeking other treatment without demand for better treatment from original source. *Johnston v. A.C. White Lumber Co.*, 37 Idaho 617, 217 P. 979 (1923).

The liability of an employer to pay expenses incurred by an employee for hospitalization, medical and surgical treatment, was contingent on the failure of the former to provide it. If the employer had made adequate hospitalization and medical and surgical treatment available to the employee, he was not liable for other medical services procured by the latter. *Totten v. Long Lake Lumber Co.*, 61 Idaho 74, 97 P.2d 596 (1939), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

Liability of employer to furnish proper and adequate medical and hospital service was positive and was guaranteed by insurer. In re *Idaho Hosp. Ass'n*, 76 Idaho 34, 277 P.2d 287 (1954).

The finding of the board that the repair of the hernia was without authorization of respondents, employer and surety, was erroneous for the evidence showed that the employer in nowise attempted to direct or control employee's choice of a physician; that employee tried to get in touch with the representative of the employer's surety but could not due to the absence of the representative, and his own doctor deemed operative procedure to be an emergency, further the employer's representative being fully cognizant of such circumstances. *Larson v. State*, 79 Idaho 446, 320 P.2d 763 (1958).

Claimant was entitled to award of expense of myelogram independently obtained by him, where he requested same of surety and was refused; but request was not sufficient to support award for expense of additional treatment indicated by myelogram where no additional request was made for such treatment. *Scott v. Aslett Constr. Co.*, 92 Idaho 834, 452 P.2d 61 (1969), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

#### **Successive Injuries.**

Where the medical services and surgery necessitated by a compensable injury would have eventually been required because of an



old injury, which was not then disabling the claimant, it was not error to order payment for such medical services and surgery, but consideration was required to be given to the old injury in determining what was a reasonable time for the employer's continuing to furnish such medical services and surgery. *Wilson v. Gardner Associated, Inc.*, 91 Idaho 496, 426 P.2d 567 (1967).

#### **Testimony of Physician.**

Physician's testimony was not privileged. *Skelly v. Sunshine Mining Co.*, 62 Idaho 192, 109 P.2d 622 (1941).

#### **Treatment as Payment of Compensation.**

While the furnishing to the injured employee of medical, surgical, or hospital services and other attendance or treatment may

have been treated as payment of compensation, such was not the subject of an agreement or an award which was contemplated under the statute providing for modification of awards and agreements. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

#### **"Treatment" Defined.**

The statute did not attempt to specify every kind of treatment which should be provided — it did provide for "other attendance or treatment." In common parlance and often in the law the word "treatment" was a broad term and was employed to indicate all steps taken in order to effect a cure of an injury or disease. *Hamilton v. Boise Cascade Corp.*, 84 Idaho 209, 370 P.2d 191 (1962).

### **RESEARCH REFERENCES**

**A.L.R.** — Right to maintain malpractice suit against injured employee's attending physician notwithstanding receipt of workmen's compensation award. 28 A.L.R.3d 1066.

**72-433. Submission of injured employee to medical examination or physical rehabilitation.** — (1) After an injury or contraction of an occupational disease and during the period of disability the employee, if requested by the employer or ordered by the commission, shall submit himself for examination at reasonable times and places to a duly qualified physician or surgeon. The employee shall be reimbursed for his expenses of necessary travel and subsistence in submitting himself for any such examination and for loss of wages, if any. For purposes of this section, the reimbursement for loss of wages shall be at the employee's then current rate of pay if the employee is then working; otherwise, such reimbursement shall be at the total temporary disability rate. Reimbursement for travel expenses, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided, however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip distance of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel.

(2) The employee shall have the right to have a physician or surgeon designated and paid by himself present at an examination by a physician or surgeon so designated by the employer. Such right, however, shall not be construed to deny the employer's designated physician or surgeon the right to visit the injured employee during reasonable times and under all reasonable conditions during disability. The employee and the examining physician shall have the right to have an audio recording of any examination, but may have a video recording only if the examining physician and the employee consent.

(3) At any time after injury, if an injured employee be sent to a facility approved by the commission for physical or vocational rehabilitation, the employee shall be furnished by the employer reasonable travel accommo-

dations to and from such facility and if the injured employee is an outpatient in a physical rehabilitation facility, he shall be paid daily subsistence as the commission may authorize to cover reasonable expenses of board, lodging and transportation. Reimbursement for transportation expense, if the employee utilizes a private vehicle, shall be at the mileage rate allowed by the state board of examiners for state employees; provided however, that the employee shall not be reimbursed for the first fifteen (15) miles of any round trip, nor for traveling any round trip distance of fifteen (15) miles or less. Such distance shall be calculated by the shortest practical route of travel. [I.C., § 72-433, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 132, § 5, p. 1329; am. 1990, ch. 110, § 1, p. 221; am. 1997, ch. 274, § 10, p. 799.]

## JUDICIAL DECISIONS

### ANALYSIS

Legislative intent.  
Obstruction of examination.  
Presence of third person.  
Retraining.  
—Travel accommodations.

#### Legislative Intent.

The legislative intent of this section is to protect an employee compelled to undergo medical examination by physicians whom he or she did not select against potential intrusive questions and techniques. Since physicians are obviously more versed in the techniques of medical examinations, the Idaho legislature intended to ensure that a claimant concerned about a compulsory second exam scheduled by the surety and conducted by a physician not of the employee's choosing would be able to protect against unwarranted examination questions or techniques. *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 814 P.2d 424 (1991).

#### Obstruction of Examination.

Employee's insistence that she be allowed to tape record her medical examination did not rise to the level of unreasonable obstruction of the examination. *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 814 P.2d 424 (1991).

As a matter of law, a workers' compensation claimant unreasonably refused to cooperate with a medical examination when the claimant refused to complete an intake form or any of the paperwork requested by a physician attempting to perform an independent medical exam. *Brewer v. La Crosse Health &*

*Rehab*, 138 Idaho 859, 71 P.3d 458 (2003).

#### Presence of Third Person.

This section does not contain any express enumeration of persons who can or can not attend a medical evaluation or exam. The statute simply guarantees the right of an employee to attend a compelled medical examination with a physician of his or her choice. The fact that the statute allows the employee's physician to be present does not automatically or necessarily exclude all others. The plain language of the statute does not suggest that all others are excluded but rather only that a claimant's physician may be present. *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 814 P.2d 424 (1991).

#### Retraining.

##### —Travel Accommodations.

An injured employee for whom retraining is authorized or ordered under § 72-450 is entitled to be furnished by the employer with reasonable travel accommodations to and from a facility approved by the commission for the retraining. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990).

**Cited in:** *Carter v. Garrett Freightlines*, 105 Idaho 59, 665 P.2d 1069 (1983); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Duty of injured.  
Examination aggravating injury.  
In general.  
Request by employer.



### Duty of Injured.

It was the duty of an injured employee to minimize the injury as much as he reasonably might. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

### Examination Aggravating Injury.

Where, after injury, employee was further injured by doctor employed by employer's compensation insurance carrier while undergoing examination for carrier's benefit, he had no right of action against the insurance carrier unless such injury did not arise out of and in the course of employment and was not compensable under Idaho Workmen's Compensation Act, or injury was sustained under circumstances as to create liability in one other than his employer. *Schulz v. Standard Accident Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954).

### In General.

The question of the unreasonableness of claimant's refusal to submit to diagnostic and conservative treatment was a question of fact to be determined by the industrial accident board. *Profitt v. DeAtley-Overman, Inc.*, 86 Idaho 207, 384 P.2d 473 (1963).

### Request by Employer.

Where defendant employer did not ask plaintiff to see defendant's doctor until plaintiff had already procured medical and hospital care, plaintiff was not asked to submit to an examination, and the findings of the board that the medical and hospital expenses incurred by plaintiff were reasonable, and that defendant was not prejudiced by the fact that plaintiff was treated by his own doctor, were proper. *Collins v. Moyle*, 83 Idaho 151, 358 P.2d 1035 (1961).

**72-434. Effect of refusing medical examination — Discontinuance of compensation.** — If an injured employee unreasonably fails to submit to or in any way obstructs an examination by a physician or surgeon designated by the commission or the employer, the injured employee's right to take or prosecute any proceedings under this law shall be suspended until such failure or obstruction ceases, and no compensation shall be payable for the period during which such failure or obstruction continues. [I.C., § 72-434, as added by 1971, ch. 124, § 3, p. 422; am. 1997, ch. 274, § 11, p. 799.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### Unreasonable Refusal.

As a matter of law, a workers' compensation claimant unreasonably refused to cooperate with a medical examination when the claimant refused to complete an intake form or any of the paperwork requested by a physician

attempting to perform an independent medical exam. *Brewer v. La Crosse Health & Rehab*, 138 Idaho 859, 71 P.3d 458 (2003).

**Cited in:** *Hewson v. Asker's Thrift Shop*, 120 Idaho 164, 814 P.2d 424 (1991).

## DECISIONS UNDER PRIOR LAW

### Unreasonable Refusal.

Evidence supported board's findings that claimant was unreasonable in his refusal to submit to conservative diagnostic treatment for two weeks when tendered by former employer, such treatment to include neither a myelogram nor surgery, such diagnostic treatment being recommended in order that the nature of claimant's back injury or affliction

be accurately determined, regardless of claimant's contention that he should not be required to submit to such diagnostic treatment unless compensation payments were resumed from the date of original suspension caused by his refusal to accept medical treatment up through the time of the diagnostic treatment. *Profitt v. DeAtley-Overman, Inc.*, 86 Idaho 207, 384 P.2d 473 (1963).

**72-435. Injurious practices — Suspension or reduction of compensation.** — If an injured employee persists in unsanitary or unreasonable practices which tend to imperil or retard his recovery the commission may order the compensation of such employee to be suspended or reduced. [I.C., § 72-435, as added by 1971, ch. 124, § 3, p. 422.]

**72-436. Burial expenses.** — If death results from the injury within four (4) years, the employer shall pay to the person entitled to compensation, or if there is none then to the personal representative of the deceased employee, the actual amount of burial expenses as defined in section 72-102(4), Idaho Code. [I.C., § 72-436, as added by 1971, ch. 124, § 3, p. 422; am. 2006, ch. 206, § 4, p. 627.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 206, updated the section reference.

**72-437. Occupational diseases — Right to compensation.** — When an employee of an employer suffers an occupational disease and is thereby disabled from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, or dies as a result of such disease, and the disease was due to the nature of an occupation or process in which he was employed within the period previous to his disablement as hereinafter limited, the employee, or, in case of his death, his dependents shall be entitled to compensation. [I.C., § 72-437, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — Dependents, §§ 72-102, 72-410. Procedures, § 72-701 et seq.

Employee, employer, occupational disease, defined, § 72-102.

#### JUDICIAL DECISIONS

##### ANALYSIS

Apportionment.  
Construction with other statutes.  
Disabled.  
Injurious exposure.  
Liability of surety.  
Preexisting conditions.  
Reoccurrence of prior disease.

##### Apportionment.

Under this section and § 72-439, the last injurious exposure is not the only basis for liability, and if there were more than one surety liable during the one year limitation period defined in § 72-439, some form of apportionment would be necessary. *Peckham v.*

*Producer's Lumber Co.*, 116 Idaho 675, 778 P.2d 797 (1989).

##### Construction With Other Statutes.

Because § 72-432(1) is more specific with respect to medical and surgical coverage for occupational diseases than this section, and



the scope of the benefits addressed within § 72-432(1) is more narrowly focused than that of this section, the "compensation" contemplated under this section includes income benefits, medical and related benefits, and medical services, while § 72-432(1) restricts its focus to medical services only. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000).

It is clear that § 72-432(1) was intended to address medical and surgical benefits for claimants manifesting an occupational disease, while this section was intended to address a claimant's entitlement to benefits for lost income and other compensation; therefore, where a claimant seeks compensation for an occupational disease, benefits for medical services, appliances and supplies are to be determined according to § 72-432, and all other forms of compensation claimed for an occupational disease are to be determined pursuant to this section. *Mulder v. Liberty Northwest Ins. Co.*, 135 Idaho 52, 14 P.3d 372 (2000).

#### **Disabled.**

Claimant who continued performing his meat cutting tasks at defendant company, which tasks induced his carpal tunnel syndrome, until the day he was terminated by defendant company and undisputedly continued similar meat cutting tasks at his subsequent employer was not disabled within the meaning of § 72-102(21)(c) and this section during his employment with defendant company and was not entitled to compensation benefits for medical treatment. *Kitchen v. Tidyman Foods*, 130 Idaho 1, 936 P.2d 199 (1997).

Because a claimant's impairment did not actually and totally incapacitate her from performing her employment duties, she was not "disabled" and therefore not entitled to

benefits for an occupational disease. *Tupper v. State Farm Ins.*, 131 Idaho 724, 963 P.2d 1161 (1998).

#### **Injurious Exposure.**

Under this section liability is based on injurious exposure, not necessarily just the last injurious exposure; whether a particular exposure was the last injurious exposure has significance only because of the limitation imposed by § 72-439. *Peckham v. Producer's Lumber Co.*, 116 Idaho 675, 778 P.2d 797 (1989).

#### **Liability of Surety.**

Sureties which insure an employer during the year before an employee is totally incapacitated are potentially liable for compensation; their actual liability will depend on factual findings by the Industrial Commission as to when injurious exposure occurred and when total incapacity occurred. *Peckham v. Producer's Lumber Co.*, 116 Idaho 675, 778 P.2d 797 (1989).

#### **Preexisting Conditions.**

Nothing in § 72-102, this section and § 72-439 indicates an intent to require that an employer who employs an employee who comes to the employment with a preexisting occupational disease will be liable for compensation if the employee is disabled by the occupational disease due to an injurious exposure in the new employment. *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 953 P.2d 989 (1998).

#### **Reoccurrence of Prior Disease.**

An employee may be disabled more than once by a particular occupational disease. *Blang v. Basic Am. Foods*, 125 Idaho 275, 869 P.2d 1370 (1994).

**Cited in:** *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987); *Cawley v. Idaho Nuclear Corp.*, 117 Idaho 34, 784 P.2d 890 (1989).

### **DECISIONS UNDER PRIOR LAW**

#### **ANALYSIS**

Appeals.

Right to compensation.

#### **Appeals.**

The Supreme Court may have sent the case back to the industrial accident board for additional findings of fact where the award was affirmed upon grounds differing from those assigned by such board, as, for instance, where the board decided that there was an accident and the Supreme Court concluded that there was no accident, but that the claim could be sustained on the theory that the deceased died from an occupational disease. *Goasland v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

#### **Right to Compensation.**

If dermatitis, an occupational disease, actually and totally disabled and incapacitated claimant from performing his work as an auto mechanic in his last occupation where he was injuriously exposed to such disease he was entitled to compensation and it was not necessary to decide whether dermatitis was a temporary and recurring disease or a permanent disease. *Frisk v. Garrett Freightlines, Inc.*, 76 Idaho 27, 276 P.2d 964 (1954).

**72-438. Occupational diseases.** — Compensation shall be payable for disability or death of an employee resulting from the following occupational diseases:

(1) Poisoning by lead, mercury, arsenic, zinc, or manganese, their preparations or compounds in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

(2) Carbon monoxide poisoning or chlorine poisoning in any process or occupation involving direct exposure to carbon monoxide or chlorine in buildings, sheds, or inclosed places.

(3) Poisoning by methanol, carbon bisulphide, hydrocarbon distillates (naphthas and others) or halogenated hydrocarbons, or any preparations containing these chemicals or any of them, in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

(4) Poisoning by benzol or by nitro, amido, or amino-derivatives of benzol (dinitro-benzol, anilin and others) or their preparations or compounds in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

(5) Glanders in the care or handling of any equine animal or the carcass of any such animal.

(6) Radium poisoning by or disability due to radioactive properties of substances or to Roentgenray (X-ray) in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

(7) Poisoning by or ulceration from chromic acid or bichromate of ammonium, potassium, or sodium or their preparations, or phosphorus preparations or compounds, in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

(8) Ulceration due to tar, pitch, bitumen, mineral oil, or paraffin, or any compound product, or residue of any of these substances, in any occupation involving direct contact therewith, handling thereof, or exposure thereto.

(9) Dermatitis venenata, that is, infection or inflammation of the skin, furunculosis excepted, due to oils, cutting compounds, lubricants, liquids, fumes, gases, or vapors in any occupation involving direct contact therewith, handling thereof or exposure thereto.

(10) Anthrax occurring in any occupation involving the handling of or exposure to wool, hair, bristles, hides, skins, or bodies of animals either alive or dead.

(11) Silicosis in any occupation involving direct contact with, handling of, or exposure to dust of silicon dioxide ( $\text{SiO}_2$ ).

(12) Cardiovascular or pulmonary or respiratory diseases of a paid fireman, employed by a municipality, village or fire district as a regular member of a lawfully established fire department, caused by overexertion in times of stress or danger or by proximate exposure or by cumulative exposure over a period of four (4) years or more to heat, smoke, chemical fumes or other toxic gases arising directly out of, and in the course of, his employment.

(13) Acquired immunodeficiency syndrome (AIDS), AIDS related complexes (ARC), other manifestations of human immunodeficiency virus (HIV) infections, infectious hepatitis viruses and tuberculosis in any occupation involving exposure to human blood or body fluids.



Recognizing that additional toxic or harmful substances or matter are continually being discovered and used or misused, the above enumerated occupational diseases are not intended to be exclusive, but such additional diseases shall not include hazards which are common to the public in general and which are not within the meaning of section 72-102(22)(a), Idaho Code, and the diseases enumerated in subsection (12) of this section pertaining to paid firemen shall not be subject to the limitations prescribed in section 72-439, Idaho Code. [I.C., § 72-438, as added by 1971, ch. 124, § 3, p. 422; am. 1973, ch. 108, § 1, p. 193; am. 1981, ch. 261, § 8, p. 552; am. 1989, ch. 155, § 14, p. 371; am. 1990, ch. 188, § 1, p. 417; am. 2001, ch. 212, § 1, p. 837; am. 2006, ch. 206, § 5, p. 627.]

### STATUTORY NOTES

**Cross References.** — Occupational disease defined, § 72-102.

For diseases caused or aggravated by accidental injury, see § 72-406.

**Amendments.** — The 2006 amendment, by ch. 206, updated the first section reference in the final paragraph.

**Compiler's Notes.** — The words enclosed

in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 21 of S.L. 1989, ch. 155 provided that the act should take effect January 15, 1990.

Section 2 of S.L. 1990, ch. 188 declared an emergency. Approved March 29, 1990.

### JUDICIAL DECISIONS

#### ANALYSIS

Construction.

Disease not listed.

Loss of hearing.

Time of manifestation of disease.

#### Construction.

It is preferable to continue construing § 72-102 and this section's categories of "accident" and "occupational disease" as mutually exclusive. *Bowman v. Twin Falls Constr. Co.*, 99 Idaho 312, 581 P.2d 770 (1978), overruled on other grounds, *Demain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999).

#### Disease Not Listed.

Carpal tunnel syndrome does constitute an occupational disease under § 72-102(17) (now (21)) and the mere fact that it is not listed in this section did not preclude the Industrial Commission from finding and concluding that it was an occupational disease. *Kinney v. Tupperware Co.*, 117 Idaho 765, 792 P.2d 330 (1990).

#### Loss of Hearing.

The list of diseases enumerated in this section is not exclusive; accordingly, the commission properly held that a gradual loss of hearing constituted an occupational disease.

*Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 672 P.2d 1055 (1983).

Since workers' compensation claimant did not prove, to a reasonable degree of medical probability, that his ear condition, whether a disease or injury related, arose out of and in the course of his employment, employer was not liable for any compensation. *Buffington v. Potlatch Corp.*, 125 Idaho 837, 875 P.2d 934 (1994).

#### Time of Manifestation of Disease.

An occupational disease does not manifest itself, for the purpose of notice and filing provisions, until the employee is first informed by competent medical authority of the nature and work related cause of the disease. *Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 672 P.2d 1055 (1983).

**Cited in:** *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987); *Cawley v. Idaho Nuclear Corp.*, 117 Idaho 34, 784 P.2d 890 (1989).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Acute poisonings.  
Burden of proof.  
Carbon monoxide.  
—Buildings, sheds or inclosed places.  
Covered disabilities only compensable.  
Dermatitis.  
Evidence.  
Expert testimony.  
Fluorides.  
Occupational disease defined and distinguished.  
Pleurisy and pneumonia.  
Pleurisy and tuberculosis.  
Silicosis.  
Undulant fever.

**Acute Poisonings.**

Acute poisoning from carbon disulphide, nonoccupational but compensable as accidental injury. *Sullivan Mining Co. v. Aschenbach*, 33 F.2d 1 (9th Cir.), cert. denied, 280 U.S. 586, 50 S. Ct. 35, 74 L. Ed. 635 (1929).

Acute dermatitis from cedar poisoning for which workman had susceptibility was not compensable as occupational disease. *Reader v. Milwaukee Lumber Co.*, 47 Idaho 380, 275 P. 1114 (1929).

Lead poisoning was nonoccupational, but compensable as accidental injury. *Ramsay v. Sullivan Mining Co.*, 51 Idaho 366, 6 P.2d 856 (1931); *Wozniak v. Stoner Meat Co.*, 57 Idaho 439, 65 P.2d 768 (1937).

**Burden of Proof.**

A claimant seeking to recover compensation for an occupational disease had the burden of showing compensable disablement under the occupational disease compensation act. *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).

**Carbon Monoxide.**

Where the death of an employee results from an occupational disease, recovery may be had only because of the onslaught of such disease, and not by reason of an accidental injury, and carbon monoxide poisoning was an occupational disease, and, therefore, recovery may not have been sustained as for an accidental injury. *Goaslind v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

**—Buildings, Sheds or Inclosed Places.**

The legislature, by using the words "buildings, sheds or inclosed places" evidently meant and intended "inclosed places" to include other places than buildings and sheds and must have intended to include other than fixed loci. *Goaslind v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

The driver of a motor vehicle, who was required to occupy a position thereon under a

roof or covering sustained by four uprights or posts but not otherwise inclosed, and while thus occupying this position inhaled monoxide poisoning, came within the meaning of "buildings, sheds or inclosed places" and was entitled to compensation under the occupational disease law. *Goaslind v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

**Covered Disabilities Only Compensable.**

The fact that claimant "thought that the injury was occupational" was insufficient notice of any claimed accident allegedly resulting in a compensation covered injury and though the disability was from an occupational cause, such disability was not compensable if not covered by the statute. *Ansbaugh v. Potlatch Forests, Inc.*, 80 Idaho 515, 334 P.2d 442 (1959).

Workmen's compensation was not payable for a disability caused by any occupational disease other than as set out in the occupational disease compensation law. *Ansbaugh v. Potlatch Forests, Inc.*, 80 Idaho 515, 334 P.2d 442 (1959).

**Dermatitis.**

If dermatitis, an occupational disease, actually and totally disabled and incapacitated claimant from performing his work as an auto mechanic in his last occupation where he was injuriously exposed to such disease, he was entitled to compensation and it was not necessary to decide whether dermatitis was a temporary and recurring disease or a permanent disease. *Frisk v. Garrett Freightlines, Inc.*, 76 Idaho 27, 276 P.2d 964 (1954).

**Evidence.**

In the absence of substantial evidence to support the contention that the disease or infection from which the claimant suffered was contracted through the inhalation of onion fumes, or that her illness or infection arose naturally and proximately out of her employment, a denial of an award must be



upheld. *Morgan v. Simplot*, 66 Idaho 584, 155 P.2d 917 (1945).

Where death followed soon after an injury to an able bodied man, there arose presumption or a natural inference that the death was caused by the injury, in the absence of believed contrary testimony, and even though the only doctor who testified stated that there was no causal relation, an award to a claimant might stand, as the doctor might be disbelieved and causal relation inferred from the rest of the evidence. *Stralovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948).

### **Expert Testimony.**

Analysis of the case because of its medical aspects required and was dependent upon the expert medical knowledge of the physicians and the basis of any order or award of compensation benefits under the occupational disease law had to rest upon and be supported by such expert testimony. *Stockdale v. Sunshine Mining Co.*, 84 Idaho 506, 373 P.2d 935 (1962).

### **Fluorides.**

The schedule did not include any disease resulting from contact with fluorine or fluorides. *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).

### **Occupational Disease Defined and Distinguished.**

An occupational disease had its origin in the inherent nature or mode of work of the profession or industry and it was the usual result or concomitant, not the result of some extrinsic or independent agency. *Ramsay v. Sullivan Mining Co.*, 51 Idaho 366, 6 P.2d 856 (1931).

An occupational or industrial disease was one which arose from causes incident to the profession or labor of the party's occupation or calling. If, therefore, a disease was not a customary or natural result of the profession or industry, per se, but was the consequence of some extrinsic condition or independent agency, the disease or injury could not be imputed to the occupation or industry, and was in no accurate sense an occupational or industrial disease. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933). But see, *Goaslind v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

The distinction between a condition amounting to an occupational disease, within the meaning of the Occupational Disease Act, and an accidental disease, compensable under the Compensation Act, was the suddenness of the onslaught. *Dobbs v. Bureau of Hwys.*, 63 Idaho 290, 120 P.2d 263 (1941).

In order to warrant recovery under the provisions of this act the disease complained of had to be peculiar to a given occupation or

brought about by condition to which all workmen in the occupation are constantly exposed. *Morgan v. Simplot*, 66 Idaho 584, 155 P.2d 917 (1945).

### **Pleurisy and Pneumonia.**

Employee's pleurisy was not an occupational disease and, not resulting from accident, was not compensable. *Stevens v. Driggs*, 65 Idaho 733, 152 P.2d 891 (1944).

Pneumonia allegedly contracted from inhalation of onion fumes was not compensable under Occupational Disease Act. *Morgan v. Simplot*, 66 Idaho 584, 155 P.2d 917 (1945).

### **Pleurisy and Tuberculosis.**

Neither pleurisy nor tuberculosis was an occupational disease. *Flasche v. Bunker Hill Co.*, 83 Idaho 420, 363 P.2d 1024 (1961); *Stockdale v. Sunshine Mining Co.*, 84 Idaho 506, 373 P.2d 935 (1962).

### **Silicosis.**

A claim may have been allowed when the accident was due to repetitious cumulative causes, preventable by employer. *Beaver v. Morrison-Knudsen Co.*, 55 Idaho 275, 41 P.2d 605 (1934); *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1938); *Nixon v. St. Joseph Lead Co.*, 60 Idaho 64, 87 P.2d 1007 (1938).

The statute clearly recognized two classes of silicosis: (a) "disability" silicosis and (b) "nondisabling silicosis." The disease of either class, as recognized by the statute, however, was silicosis, whether it was disabling or nondisabling. It was clearly the intention of the legislature that liability for such condition should not be imposed by law upon the last employer until he had exposed the employee to at least sixty days' hazard of "dust of silicon dioxide (SiO<sub>2</sub>)." *Habera v. Polaris Mining Co.*, 62 Idaho 54, 108 P.2d 297 (1940).

Where a mining company employed a workman with the understanding he could remain in its employment only if he passed a successful "pre-employment examination" and the examination given twenty days later disclosed that the workman was rejected because of nondisabling silicosis, the workman could not recover compensation under the Occupational Disease Compensation Law from the company, since an employee suffering from silicosis, whether disabling or nondisabling, must have been exposed to the germs of the disease during the period of sixty days or more in the employment of the employer to be entitled to compensation under this law. *Habera v. Polaris Mining Co.*, 62 Idaho 54, 108 P.2d 297 (1940).

Between antipodes of silicosis as an occupational disease and its accidental contraction there was a zone wherein, depending on the particular circumstances of the case and accidental features, or the absence thereof,

affliction from silicosis would or would not justify compensation. *Howard v. Texas Owyhee Mining & Dev. Co.*, 62 Idaho 707, 115 P.2d 749 (1941).

Combined silicosis and tuberculosis, causing the total disability of the employee, after being employed in the dust of a rock crusher for two years, sustained an award for compensation for accidental pulmonary tuberculosis brought on by silica dust. *Dobbs v. Bureau of Hwys.*, 63 Idaho 290, 120 P.2d 263 (1941).

Though the compensation claimant, in the first instance, contended that his total disability was caused by silicosis, it was incumbent on the board to determine whether the claimant was afflicted with disabling or nondisabling silicosis within this act, or accidental tuberculosis within the compensation act, and enter an order accordingly. *Dobbs v. Bureau of Hwys.*, 63 Idaho 290, 120 P.2d 263 (1941).

Disease not contracted or aggravated in last employment, compensation denied. *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942).

Where plaintiff was injuriously exposed to the inhalation of silica dust of quantity and quality sufficient to cause the silicotic condi-

tion, finding and conclusion of the industrial accident board that plaintiff, at most, had suffered partial disability due to silicosis, which was not compensable, was sufficiently sustained and justified by the evidence, and would not be disturbed on appeal. *Carlson v. Small Leasing Co.*, 71 Idaho 35, 225 P.2d 469 (1950).

Silicosis was not compensable as an accident, where evidence showed disease was not due to a sudden onslaught, but was due to a gradual exposure over a period of years. *Shumaker v. Hunter Lease & Gold Hunter Mines*, 72 Idaho 173, 238 P.2d 425 (1951).

Claimant could not recover for disability from tuberculosis on the basis of an occupational disease if silicosis was not present, since tuberculosis was not an occupational disease. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952).

#### **Undulant Fever.**

Undulant fever contracted by an employee in handling dairy cows at some unknown time or times during the year 1931 was an injury by accident out of, and in the course of, the claimant's employment and was compensable as such. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

### **72-439. Actually incurred/nonacute occupational disease. —**

(1) An employer shall not be liable for any compensation for an occupational disease unless such disease is actually incurred in the employer's employment.

(2) An employer shall not be liable for any compensation for a nonacute occupational disease unless the employee was exposed to the hazard of such disease for a period of sixty (60) days for the same employer.

(3) Where compensation is payable for an occupational disease, the employer, or the surety on the risk for the employer, in whose employment the employee was last injuriously exposed to the hazard of such disease, shall be liable therefor. [I.C., § 72-439, as added by 1971, ch. 124, § 3, p. 422; am. 1997, ch. 274, § 12, p. 799.]

### **STATUTORY NOTES**

**Cross References.** — Notice of injury and claim, § 72-701.

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

Apportionment.  
Constitutionality.  
— Time limits.  
Construction.  
Findings.  
Hazardous exposure.  
Liability of last employer.  
Liability of surety.



Preexisting conditions.  
Time limits.

### **Apportionment.**

Under § 72-437 and this section, the last injurious exposure is not the only basis for liability, and if there were more than one surety liable during the one year limitation period defined in this section, some form of apportionment would be necessary. *Peckham v. Producer's Lumber Co.*, 116 Idaho 675, 778 P.2d 797 (1989).

### **Constitutionality.**

#### **—Time Limits.**

The legislature's imposition of a 60-day time requirement in this section before providing compensation for diseases which take a considerable period of time to develop bears a reasonable relation to the goal of fairness to the employer and also lessens the burden on the compensation system; thus, this section does not violate either the equal protection clause or the due process clause of either the United States or Idaho Constitutions. *Bint v. Creative Forest Prods.*, 108 Idaho 116, 697 P.2d 818, appeal dismissed, 474 U.S. 803, 106 S. Ct. 35, 88 L. Ed. 2d 28 (1985).

### **Construction.**

This section defines the compensability of claims. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Read together with § 72-102(17)(c) (now (21)(c)), this section means that a claimant can receive no compensation for an occupational disease unless he is totally incapacitated from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

### **Findings.**

Where a claimant contracted allergic contact dermatitis as a result of exposure to chromates and could no longer work in any occupation involving such exposure, the court could not determine whether his claim was compensable under this section without findings as to the date the claimant was last exposed and the date of disablement and, accordingly, the case must be remanded to the commission for findings on these issues. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

### **Hazardous Exposure.**

This section does not require that a claimant's exposure to the hazardous substance be continuous for 60 days. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Where a claimant contracted dermatitis, which typically is first manifested as a minor

irritation and frequently occurs in less than 60 days after exposure to the irritant, the commission erred in requiring the claimant to prove that he had been exposed to the hazards of the disease for 60 days prior to the first manifestation thereof since nothing in this section requires that the 60-day exposure be prior to the first manifestation. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

A day of exposure, under this section, means a calendary day of work; the calendary day rule eliminates procedural technicalities and it also gives workers the benefit of the doubt in those cases where they have worked less than an eight-hour shift on a given day or where their shift started on one day and ended on another. *Bint v. Creative Forest Prods.*, 108 Idaho 116, 697 P.2d 818, appeal dismissed, 474 U.S. 803, 106 S. Ct. 35, 88 L. Ed. 2d 28 (1985).

Under § 72-437, liability is based on injurious exposure, not necessarily just the last injurious exposure; whether a particular exposure was the last injurious exposure has significance only because of the limitation imposed by this section. *Peckham v. Producer's Lumber Co.*, 116 Idaho 675, 778 P.2d 797 (1989).

### **Liability of Last Employer.**

Pursuant to § 72-102(21)(b), as an occupational disease develops over time, it is possible for the disease to be "incurred" by a claimant under a series of different employers before it becomes manifest; in such a situation, this section provides that it is the last such employer, or its insurer, who is liable to the claimant; the Idaho industrial commission found the employer to be that last employer within the meaning of this section. *Sundquist v. Precision Steel & Gypsum, Inc.*, 141 Idaho 450, 111 P.3d 135 (2005).

### **Liability of Surety.**

Sureties which insure an employer during the year before an employee is totally incapacitated are potentially liable for compensation; their actual liability will depend on factual findings by the industrial commission as to when injurious exposure occurred and when total incapacity occurred. *Peckham v. Producer's Lumber Co.*, 116 Idaho 675, 778 P.2d 797 (1989).

### **Preexisting Conditions.**

Nothing in §§ 72-102, 72-437, and this section indicates an intent to require that an employer who employs an employee who comes to the employment with a preexisting occupational disease will be liable for compensation if the employee is disabled by the

occupational disease due to an injurious exposure in the new employment. *Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 953 P.2d 989 (1998).

There is nothing in the language of subsection (3) of this section that changed the holding of *Nelson* that an aggravation or acceleration of an occupational disease was not compensable unless the aggravation or acceleration resulted from an industrial accident. *Cutsinger v. Spears Mfg. Co.*, 137 Idaho 464; 50 P.3d 479 (2002).

### **Time Limits.**

In computing the 60-day requirement for a claimant who contracted dermatitis as a result of exposure to chromates contained in wet cement, the commission must consider

the claimant's exposures to cement during noncontinuous periods of employment by the same employer. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

A worker is exposed to the hazards of an occupational disease only on those days he works within the hazardous environment; thus, the 60-day exposure requirement under this section means that an employee must have worked on 60 calendar days for the same employer before the employer is liable for worker's compensation. *Bint v. Creative Forest Prods.*, 108 Idaho 116, 697 P.2d 818, appeal dismissed, 474 U.S. 803, 106 S. Ct. 35, 88 L. Ed. 2d 28 (1985).

**Cited in:** *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

Amount of benefits vested right.  
Construction.  
Degree of exposure.  
Delay caused by apparent healing.  
Dismissal of claim.  
Hazardous exposure.  
Pleurisy.  
Silicosis.  
Time limits.

### **Amount of Benefits Vested Right.**

An employee's right to compensation or other benefits became fixed at the date of a compensable accident, and benefits and liabilities arising from death became fixed at the time of death. The legislature might change the scale of benefits before an accident or death but not after the event fixing the party's rights. *Peterson v. Federal Mining & Smelting Co.*, 67 Idaho 111, 170 P.2d 611 (1946).

### **Construction.**

If the language employed in Workmen's Compensation Act together with the Occupational Disease Law would permit, the Supreme Court should and would refrain from adopting a construction which would lead to unjust, inequitable, oppressive or absurd consequences. *Frisk v. Garrett Freightlines, Inc.*, 76 Idaho 27, 276 P.2d 964 (1954).

### **Degree of Exposure.**

Use in finding of word "hazardous" to characterize exposure was not correct, since statute used word "injurious," but finding was sustained, since word "hazardous" referred to an exposure which was "injurious." *Shumaker v. Hunter Lease & Gold Hunter Mines*, 72 Idaho 173, 238 P.2d 425 (1951).

### **Delay Caused by Apparent Healing.**

A claim for disability from allergic dermatitis contracted from dipping steel cut-

ting blades in a cleansing solution containing an acid detergent filed more than a year after the allergy rash first appeared on claimant's hands, during which time there were periods in which the rash appeared to be healing and periods in which the employer employed her at tasks in which she was not exposed to the detergent, was barred by this section. *Woodall v. Idaho Potato Processors, Inc.*, 91 Idaho 626, 428 P.2d 943 (1967).

### **Dismissal of Claim.**

Order of board dismissing occupational disease claim was not before the court on review, if no appeal was taken from order. *Dunn v. Silver Dollar Mining Co.*, 71 Idaho 398, 233 P.2d 411 (1951).

### **Hazardous Exposure.**

Finding of board that deceased was not subject to "hazardous exposure" was not error where evidence failed to show "hazardous exposure" or "injurious exposure." *Adams v. Bitco, Inc.*, 72 Idaho 178, 238 P.2d 428 (1951).

Finding of board of want of "hazardous exposure" would have been construed as a finding of want of "injurious exposure" as required by statute where evidence would support finding of lack of "injurious exposure." *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).



**Pleurisy.**

Where compensation claimant contracted pleurisy as a result of exposure in below zero weather while performing his duties as town marshal, water master and fire chief, the ailment was a nonoccupational disease and not compensable. *Stevens v. Driggs*, 65 Idaho 733, 152 P.2d 891 (1944).

**Silicosis.**

Exposure for less than 60 days, claim denied. *Hebera v. Polaris Mining Co.*, 62 Idaho 54, 108 P.2d 297 (1940); *McLean v. Hecla Mining Co.*, 62 Idaho 75, 108 P.2d 299 (1940).

Where a mining company told the workman before he commenced work that he would be required to take a physical examination, and whether he would continue in the employment of the company depended on the result of the examination, and the employee was thereafter discharged at a time when he had been exposed to the hazards of the employment for forty-five days at most, because the examination showed that he was suffering from silicosis, the workman could not recover compensation under the Occupational Disease Compensation Law, although more than sixty days had elapsed between the date on which the workman was hired by the company and the date on which he was discharged. *McLean v. Hecla Mining Co.*, 62 Idaho 75, 108 P.2d 299 (1940).

Board in determining whether claimant had been hazardedly exposed to silica dust did not err in refusing to admit exhibits of minutes of Union-Management Safety Committee concerning dusty conditions in locations where claimant had worked, since exhibits constituted hearsay evidence. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Claimant's condition of silicosis, grade 2 was not aggravated by exposure to silica dust where evidence showed that silicosis, grade 2 had not progressed as result of exposure. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Board in considering whether above surface work involved claimant in hazardous exposure to silica dust was entitled to admit evidence by employer of sampling of air where claimant worked, if conditions at the time of sampling were similar to conditions at the time of claimant's work. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Board in determining issue of hazardous exposure to silica dust by claimant was entitled to base its finding on standard testified to by authority on silicosis. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

**Time Limits.**

Claimant's position that even though he was not entitled to a recovery under the occupational disease statutes, as not having been disabled within two years of his last exposure to silicosis that he was entitled to compensation on the theory that his tuberculosis was so sudden and unexpected as to be accidental was defeated by a stipulation showing the tuberculosis to have been slowly progressive over a number of years. *Hill v. Sullivan Mining Co.*, 68 Idaho 574, 201 P.2d 93 (1948).

Time limitations were merely statutes of limitation which may have been waived by the action of the employer or surety, where such action could have led the claimant to believe that his request for compensation was still under consideration by the employer. *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969).

Where miner due to silicosis was given surface work in 1954, and became disabled from silicosis in 1966, his claim was governed by the statute in effect in 1966, as amended in 1965 wherein the amendment deleted the two-year limitation, as there was no limitation between the time of last injurious exposure and disability imposed by the amendment. *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969).

**72-440. Time of dependency — Death benefits.** — No compensation for death from an occupational disease shall be payable to any person whose relationship to the deceased, which would give right to compensation, arose subsequent to the beginning of the first compensable disability, save only to posthumous children of a marriage existing at the beginning of such disability. [I.C., § 72-440, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Cross References.** — Dependency, when determined, disability benefits, §§ 72-401, 72-411.

**72-441. No compensation in case of misrepresentation.** — No compensation shall be payable for an occupational disease if the employee, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself in writing as not having previously been disabled, laid off, or compensated in damages or otherwise because of such disease. [I.C., § 72-441, as added by 1971, ch. 124, § 3, p. 422.]

**72-442. Wilful self-exposure. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which 124, § 3, p. 422, was repealed by S.L. 1998, comprised § 72-442, as added by 1971, ch. 254, § 1, effective July 1, 1998.

**72-443. Period of exposure in silicosis cases.** — No claim for disability or death from silicosis shall be maintained or prosecuted unless during the ten (10) years immediately preceding the date of disablement the employee has been exposed to the inhalation of silica dust over a period of not less than five (5) years, the last two (2) of which shall have been in this state, under a contract of employment existing in this state, provided, that if the employee shall have been employed by the same employer during the whole of such five (5) year period his right to compensation against such employer shall not be affected by the fact that he had been employed during any part of such period outside of this state. [I.C., § 72-443, as added by 1971, ch. 124, § 3, p. 422.]

#### JUDICIAL DECISIONS

##### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Burden of proof.  
Expert testimony.  
Exposure period.  
Legislative purpose.  
Time limits.

##### **Burden of Proof.**

Even though respondent had worked as a hard coal miner and was more or less exposed to inhalation of silica dust, the board found he failed to prove by a preponderance of the evidence that his disablement was the result of silicosis or that silicosis was an essential factor complicating his tuberculosis. *Flasche v. Bunker Hill Co.*, 83 Idaho 420, 363 P.2d 1024 (1961).

##### **Expert Testimony.**

Analysis of the case because of its medical aspects required and was dependent upon the expert medical knowledge of the physicians and the basis of any order or award of compensation benefits under the occupational disease law had to rest upon and be supported by

such expert testimony. *Stockdale v. Sunshine Mining Co.*, 84 Idaho 506, 373 P.2d 935 (1962).

##### **Exposure Period.**

Claimant was exposed to silica for five-year period where evidence showed that he worked underground for last employer from October of 1947 to June 1, 1952, and was exposed for 19 weeks to silica dust subsequent to 1942 and prior to 1947. *Peterson v. Sunset Minerals, Inc.*, 75 Idaho 354, 272 P.2d 692 (1954).

Where evidence showed that during 10 year period the claimant was exposed to silica dust for period of 3½ years for one employer and one-half year with another employer, he was not entitled to award for occupational disease since he had not been exposed for five years



during 10-year period. *Yanzick v. Sunset Minerals, Inc.*, 75 Idaho 384, 272 P.2d 696 (1954).

**Legislative Purpose.**

The occupational disease compensation statute was a departure from the original compensation law and was intended to include certain occupational diseases in the list of compensable accidents not theretofore covered. In attempting to do so, the legislature evidently anticipated difficulty in the application and administration of such an act unless very definite bounds were fixed within which it might operate. It accordingly prescribed certain limitations and prohibitions. *Habera*

*v. Polaris Mining Co.*, 62 Idaho 54, 108 P.2d 297 (1940).

**Time Limits.**

Where miner due to silicosis was given surface work in 1954, and became disabled from silicosis in 1966, his claim was governed by former § 72-1206 in effect in 1966, as amended in 1965 wherein the amendment deleted the two-year limitation, as there was no limitation between the time of last injurious exposure and disability imposed by the amendment. *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969).

**72-444. No compensation for partial disability from silicosis. —** Compensation shall not be payable for partial disability due to silicosis. [I.C., § 72-444, as added by 1971, ch. 124, § 3, p. 422.]

**JUDICIAL DECISIONS**

DECISIONS UNDER PRIOR LAW

**Evidence.**

Where plaintiff was injuriously exposed to the inhalation of silica dust of quantity and quality sufficient to cause the silicotic condition, finding and conclusion of the industrial accident board that plaintiff, at most, had

suffered partial disability due to silicosis, which was not compensable, was sufficiently sustained and justified by the evidence, and would not be disturbed on appeal. *Carlson v. Small Leasing Co.*, 71 Idaho 35, 225 P.2d 469 (1950).

**72-445. Compensation for total disability or death from complicated silicosis. —** In case of disability or death from silicosis, complicated with tuberculosis of the lungs, income benefits shall be payable as for uncomplicated silicosis, provided, that the silicosis was an essential factor in causing such disability or death. In case of disability or death from silicosis complicated with any other disease, or from any other disease complicated with silicosis, the income benefits shall be reduced as provided in section 72-406. [I.C., § 72-445, as added by 1971, ch. 124, § 3, p. 422.]

**JUDICIAL DECISIONS**

DECISIONS UNDER PRIOR LAW

ANALYSIS

- Appeal.
- Burden of proof.
- Evidence.
- Expert testimony.
- Hazardous exposure.
- Tuberculosis from pleurisy.
- Tuberculosis from silica dust.

**Appeal.**

In proceeding for compensation based on occupational disease finding of board apportioning disability to the various factors in-

volved was binding on appeal where findings were supported by substantial competent evidence. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

### Burden of Proof.

Claimant in order to recover compensation for silicosis disability had to prove (1) that he was totally disabled from uncomplicated silicosis, or (2) that he was totally disabled as a result of silicosis complicated by tuberculosis of the lungs, and that silicosis is an essential factor in causing the disability. *Davis v. Sunshine Mining Co.*, 73 Idaho 94, 245 P.2d 822 (1952); *Flasche v. Bunker Hill Co.*, 83 Idaho 420, 363 P.2d 1024 (1961); *Stockdale v. Sunshine Mining Co.*, 84 Idaho 506, 373 P.2d 935 (1962).

### Evidence.

Board in considering whether above surface work involved claimant in hazardous exposure to silica dust was entitled to admit evidence by employer of sampling of air where claimant worked, if conditions at the time of sampling were similar to conditions at the time of claimant's work. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Board in determining whether claimant had been hazardedly exposed to silica dust did not err in refusing to admit exhibits of minutes of Union-Management Safety Committee concerning dusty conditions in locations where claimant had worked, since exhibits constituted hearsay evidence. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Board in determining issue of hazardous exposure to silica dust by claimant was entitled to base its finding on standard testified to by authority on silicosis. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

Claimant's condition of silicosis, grade 2 was not aggravated by exposure to silica dust where evidence showed that silicosis, grade 2 had not progressed as result of exposure. *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

### Expert Testimony.

Analysis of the case because of its medical aspects required and was dependent upon the expert medical knowledge of the physicians and the basis of any order or award of compensation benefits under the occupational disease law had to rest upon and be supported by such expert testimony. *Stockdale v. Sunshine Mining Co.*, 84 Idaho 506, 373 P.2d 935 (1962).

### Hazardous Exposure.

Finding of board of want of "hazardous exposure" would be construed as a finding of want of "injurious exposure" as required by statute where evidence would support finding of lack of "injurious exposure." *Kernaghan v. Sunshine Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952).

### Tuberculosis from Pleurisy.

The board's findings were that appellant's disability was due to active pulmonary tuberculosis, antecedent pleurisy having been the probable causative factor and not due to silicosis nor to silicosis complicated with tuberculosis of the lungs, silicosis not being an essential factor in causing the disability being sufficiently supported by the evidence and such findings would not be disturbed on appeal. *Flasche v. Bunker Hill Co.*, 83 Idaho 420, 363 P.2d 1024 (1961).

### Tuberculosis from Silica Dust.

Pulmonary tuberculosis from action of silica dust held compensable as accidental injury. *Dobbs v. Bureau of Hwys.*, 63 Idaho 290, 120 P.2d 263 (1941).

If disability was only partial, and no showing of tuberculosis, an award was not justified. *Shumaker v. Hunter Lease & Gold Hunter Mines*, 72 Idaho 173, 238 P.2d 425 (1951).

**72-446. Nondisabling silicosis — Compensation upon severance from employment.** — (1) When an employee, because he has nondisabling silicosis, is discharged from employment in which he is engaged, or when such an employee, after an examination as provided in subsection (2) of this section, and a finding by the medical panel that it is inadvisable for him to continue in his employment, terminates his employment, the commission may allow such compensation on account of such termination of employment as it may deem just, as support money pending his change of employment, payable as in this law elsewhere provided, but in no case to exceed five thousand dollars (\$5,000).

(2) Upon application of any employer or employee, the commission may direct any employee of such employer or any employee who, in the course of his employment has been exposed to the inhalation of silica dust, to submit to a medical examination to determine whether the employee has silicosis,



and the degree thereof. The results of the examination shall be submitted to the commission, which shall submit copies of such reports to the employer and employee, who shall have opportunity to rebut the same, provided, request therefor is made to the commission within thirty (30) days from the mailing of such report to the parties. The commission shall make its findings as to whether it is inadvisable for the employee to continue in his employment. [I.C., § 72-446, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The reference to the "medical panel" in this section appears to be the only such reference in the Worker's Compensation Law.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### Severance Pay.

Where the record did not show that claimant was discharged from employment, though he was not re-employable in mining as of 1948, nor was it determined by a medical panel that it was inadvisable for him to continue in his employment as a miner, because he was not then so employed, claimant was

not entitled to severance pay. *Hill v. Sullivan Mining Co.*, 68 Idaho 574, 201 P.2d 93 (1948).

An award was not justified where claimant lost job as result of closing of mine, and his employment was not terminated following examination by medical panel. *Shumaker v. Hunter Lease & Gold Hunter Mines*, 72 Idaho 173, 238 P.2d 425 (1951).

**72-447. Recurring dermatitis.** — A person who has suffered disability from dermatitis and has received income benefits therefor shall not be entitled to income benefits for disability from a later attack of dermatitis due to substantially the same cause, unless immediately preceding the date of the later disablement he has been engaged in the occupation to which the recurrence of the disease is ascribed and under the same employer for at least sixty (60) days. [I.C., § 72-447, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Dermatitis venenata defined, § 72-438.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

#### Finding of Board.

Workmen's compensation board properly found that claimant suffered from dermatitis, an occupational disease, which rendered him actually totally and permanently incapacitated and disabled from performing his work as an auto mechanic. *Frisk v. Garrett Freightlines, Inc.*, 76 Idaho 27, 276 P.2d 964 (1954).

If dermatitis, an occupational disease, actu-

ally and totally disabled and incapacitated claimant from performing his work as an auto mechanic in his last occupation where he was injuriously exposed to such disease, he is entitled to compensation and it is not necessary to decide whether dermatitis is a temporary and recurring disease or a permanent disease. *Frisk v. Garrett Freightlines, Inc.*, 76 Idaho 27, 276 P.2d 964 (1954).

**72-448. Notice and limitations.** — (1) Unless written notice of the manifestation of an occupational disease is given to the employer within sixty (60) days after its first manifestation, or to the industrial commission if the employer cannot be reasonably located within ninety (90) days after the first manifestation, and unless claim for worker's compensation benefits for an occupational disease is filed with the industrial commission within one (1) year after the first manifestation, all rights of the employee to worker's compensation due to the occupational disease shall be forever barred.

(2) Unless written notice of death from an occupational disease is given to the employer within ninety (90) days after the death, or to the industrial commission if the employer cannot be reasonably located within ninety (90) days after the death, and unless claim for worker's compensation benefits for the death is filed with the industrial commission within one (1) year after the death, all rights to worker's compensation benefits for the death shall be forever barred.

(3) If notice is given to the industrial commission under subsection (1) or (2) of this section, the industrial commission shall promptly give notice to the employer and the surety. [I.C., § 72-448, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 13, p. 572; am. 1987, ch. 108, § 1, p. 220; am. 1997, ch. 274, § 13, p. 799.]

## JUDICIAL DECISIONS

### ANALYSIS

Construction.  
Incapacity.  
Notice.  
Remand necessitated.  
Time limitations.

#### Construction.

The five-year limitation period, established by § 72-706, which runs from the first manifestation of an occupational disease conflicts with and prevails over the one-year period, running from the last payment of compensation, established by subsection (3) [now (2)] of this section. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

#### Incapacity.

Where subsection (2) of this section refers to incapacity, disability or death, the reference is not made to a partial incapacity, but rather total incapacity; "incapacity" does not refer to a partial incapacity, but rather to the total incapacity described in the statutory definition of disablement. *Cawley v. Idaho Nuclear Corp.*, 117 Idaho 34, 784 P.2d 890 (1989).

#### Notice.

The portion of subsection (1) setting out the 60-day limitation does not require the filing of a claim for disability benefits, but merely requires that an employee give written notice

to his employer. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

The 60-day provision in subsection (1) governs only the initial notice of manifestation of an occupational disease and does not require a notice to the employer upon each manifestation of the disease. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

When the first manifestation of an occupational disease occurs prior to the employee leaving his employment and the employee has already given his notice to his employer, there is no need for him to file a second notice within five months after quitting, since one notice is sufficient under subsection (1). *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Where a claimant filed written notice of injury less than 60 days after the first manifestation of the disease and while still employed by the same employer, the commission erred in ruling that the claim was barred under subsection (1) because the claimant did not file a claim for disability within five months after his employment ceased. *Jones v.*



Morrison-Knudsen Co., 98 Idaho 458, 567 P.2d 3 (1977).

Where the Industrial Commission found that immediately following the first diagnosis of hearing loss, the claimant orally submitted that information to the employer, which 12 days later denied any compensation benefits to the claimant, the commission in effect found that the employer had actual notice and specifically held that the employer was not prejudiced by lack of a written notice; therefore, since the record contained no evidence contrary to those findings and holding, the ruling of the commission relating to oral notice was affirmed. *Miller v. Amalgamated Sugar Co.*, 105 Idaho 725, 672 P.2d 1055 (1983).

For purposes of the notice and filing requirements of this section, a disease is not manifest until its cause has been clearly identified by competent medical authority as related to the employee's work and that information has been communicated to the employee, and such a holding does not change the standard of proof in workers' compensation cases from one of reasonable medical certainty to one of proof, as such a standard relates only to the notice and filing requirements of this section; once a claim is properly before the commission, the claimant will still be required to prove to a reasonable degree of medical certainty that he or she is suffering from a compensable disease. *Boyd v. Potlatch Corp.*, 117 Idaho 960, 793 P.2d 192 (1990).

#### **Remand Necessitated.**

Where the Industrial Commission concluded that worker's claim for benefits was untimely without making a finding of whether worker was, in fact, disabled, and if so, when the disability first occurred, the commission's conclusion was based on a finding relating to only one of this section's requirements, and necessitated reversal and remand to the commission so that it may determine, *inter alia*, whether worker was

disabled according to worker's compensation statutes and, if so, when the disability occurred. *Cawley v. Idaho Nuclear Corp.*, 117 Idaho 34, 784 P.2d 890 (1989).

#### **Time Limitations.**

The payment of a claimant's initial medical bills by the employer's surety will affect the question of which limitations period applies under this section. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

The five-month provision of subsection (1) applies only where the first manifestation of an occupational disease occurs after the employee has left his employment. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Where the last compensation for a claimant was received on August 20, 1973 and a claim for further compensation was filed on November 27, 1974, the claim would be barred by subsection (3) if that subsection was deemed to be controlling. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Where an employer's surety paid a claimant's initial claims and filed proof of such award with the commission, the provision in subsection (1) requiring that a disability claim be filed within one year after the disablement would not be applicable in view of language in former subsection (3) of this section and in § 72-706 stating that when compensation has been paid and then discontinued, the limitation period commences after the last payment. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

The willful failure of the employer to file a report of the occupational disease, as required by subsection (1) of § 72-602, does not operate to toll the time limitation imposed by this section, as § 72-604 does not apply to time limitations for filing claims arising from an occupational disease under this section. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

**Cited in:** *Ewing v. Holton*, 135 Idaho 792, 25 P.3d 105 (2001).

### **DECISIONS UNDER PRIOR LAW**

#### **ANALYSIS**

Delay caused by apparent healing.  
Time of notice.

#### **Delay Caused by Apparent Healing.**

A claim for disability from allergic dermatitis contracted from dipping steel cutting blades in a cleansing solution containing an acid detergent filed more than a year after the allergy rash first appeared on claimant's hands, during which time there were periods in which the rash appeared to be healing and periods in which the employer employed her at tasks in which she was not exposed to the

detergent, was barred by the statute. *Woodall v. Idaho Potato Processors, Inc.*, 91 Idaho 626, 428 P.2d 943 (1967).

#### **Time of Notice.**

Requirement of written notice within five months of last date of employment was not applicable where occupational disease involved was silicosis. *Peterson v. Sunset Minerals, Inc.*, 75 Idaho 354, 272 P.2d 692 (1954).

RESEARCH REFERENCES

**A.L.R.** — When limitations period begins to run as to claim for disability benefits for contracting of disease under Workers' Compensation or Occupational Diseases Act. 86 A.L.R.5th 295.

**72-449. Post mortem examination.** — Upon the filing of a claim for compensation for death from an occupational disease when an autopsy is necessary accurately and scientifically to ascertain and determine the cause of death, the autopsy shall be ordered by the commission. The commission may designate a duly licensed physician, who is a specialist in such examination, to perform or attend the autopsy and to certify his findings thereon. Such findings shall be filed with the commission and shall be a public record. The commission also may exercise such authority on its own motion or on application made to it at any time by any party in interest, in regard to the cause of death or the existence of any occupational disease. All proceedings for compensation shall be suspended upon refusal of a claimant or claimants to permit such autopsy when so ordered, and no compensation shall be payable during the continuance of such refusal. [I.C., § 72-449, as added by 1971, ch. 124, § 3, p. 422.]

**72-450. Retraining.** — Following a hearing upon a motion of the employer, the employee, or the commission, if the commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case may be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks. An employer and employee may mutually agree to a retraining program without the necessity of a hearing before the commission. [I.C., § 72-450, as added by 1974, ch. 132, § 6, p. 1329; am. 1978, ch. 264, § 14, p. 572; am. 1997, ch. 274, § 14, p. 799.]

JUDICIAL DECISIONS

ANALYSIS

Effect on disability evaluation.	
Exemptions.	
Retraining not mandatory.	
Subsistence benefit.	
Time period for benefits.	
Travel accommodations.	
<b>Effect on Disability Evaluation.</b>	to defer evaluating the permanent disability
Industrial Commission was not compelled	of an employee for whom retraining had been



provided until the retraining had been completed. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

#### **Exemptions.**

State Insurance Fund (SIF) was not required to pay five percent excise levy to Industrial Special Indemnity Fund (ISIF) on retraining benefits paid to claimant since retraining benefits were "temporary total or temporary partial disability benefits," which were statutorily exempt from levy. *Adams v. Caribou Mem. Hosp.*, 126 Idaho 1022, 895 P.2d 1215 (1995).

#### **Retraining not Mandatory.**

Nothing, in either this section or § 72-428, requires the Industrial Commission to order retraining for a disabled employee. *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

#### **Subsistence Benefit.**

The "subsistence benefit" provided in this section was intended to provide an employee for whom retraining is authorized or ordered

with the bare necessities of life and was not intended to cover the expenses connected with retraining; to conclude otherwise would require the claimant to use some of the payments necessary for existence in order to pursue the retraining authorized or ordered by the commission. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990).

#### **Time Period for Benefits.**

This section gives the Industrial Commission discretion to award retraining benefits for up to two fifty-two week periods. *Hipwell v. Challenger Pallet & Supply*, 859 P.2d 330 (1993).

#### **Travel Accommodations.**

An injured employee for whom retraining is authorized or ordered under this section is entitled to be furnished by the employer with reasonable travel accommodations to and from a facility approved by the commission for the retraining. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990).

**72-451. Psychological accidents and injuries.** — Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met:

(1) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by accident and physical injury as defined in section 72-102(18)(a) through (18)(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where: (i) it results in resultant physical injury so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily recognized and identifiable as having occurred in the workplace, and (iii) it must be the product of a sudden and extraordinary event; and

(2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

(3) Such accident and injury must be the predominant cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; and

(4) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho worker's compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered; and

(6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without accompanying physical injury.

This section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994. [I.C., § 72-451, as added by 1994, ch. 112, § 2, p. 255; am. 2006, ch. 206, § 6, p. 627.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 206, updated the section references in subsection (1).

### JUDICIAL DECISIONS

#### ANALYSIS

Claim barred.  
Constitutionality.  
Equal protection.

#### **Claim Barred.**

Where an employee suffered a stressful stimulus at work resulting in a psychological reaction, the industrial commission did not err in holding that that was a "mental-mental" claim where the psychological injury without an accompanying physical injury resulted from psychological causes and the employee's workers' compensation claim was statutorily barred because the employee had not provided clear and convincing evidence that the diagnosis of sinus tachycardia constituted a physical injury accompanied by her psychological reaction. *Luttrell v. Clearwater County Sheriff's Office*, 140 Idaho 581, 97 P.3d 448 (2004).

#### **Constitutionality.**

This section bears a rational relationship to the legislative purpose of compensating work-

ers for psychological injuries, disorders or conditions caused by accidents or occupational diseases since the provision specifically allows for compensation of psychological injuries and diseases when the mental injury is accompanied by an actual physical injury. *Luttrell v. Clearwater County Sheriff's Office*, 140 Idaho 581, 97 P.3d 448 (2004).

#### **Equal Protection.**

Denial of an employee's claim for psychological reaction without an accompanying physical injury, did not violate her rights under Idaho Const. art. 1, §§ 2 and 18. *Luttrell v. Clearwater County Sheriff's Office*, 140 Idaho 581, 97 P.3d 448 (2004).

### RESEARCH REFERENCES

**A.L.R.** — Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimulus — Right to compensation under particular statutory provisions. 122 A.L.R.5th 653.



## CHAPTER 5

## INDUSTRIAL COMMISSION

## SECTION.

- 72-501. Creation of commission — Appointment, term of office — Qualifications — Affiliations — Effect of accepting appointment — Vacancies — Removal of member for cause.
- 72-501A. Rehabilitation division — Budget and expense — Composition and implementation.
- 72-502. References to industrial commission to include industrial accident board.
- 72-503. Salary.
- 72-504. Organization — Chairman — Secretary.
- 72-505. Quorum — Majority to act — Effect of vacancy.
- 72-506. Acts of commission or reference — Hearing officers.
- 72-507. Seal.
- 72-508. Authority to adopt rules and regulations.
- 72-509. Offices and supplies.
- 72-510. Payment of expenses.
- 72-511. Records and forms.
- 72-512. Reports.
- 72-513. Specified employees — Exempt from personnel system.

## SECTION.

- 72-514. Assistants.
- 72-515. Fees.
- 72-516. Reports.
- 72-517. Cooperation with other agencies.
- 72-518. Duties of attorney general — Representation in court.
- 72-519. Creation of industrial administration fund — Purpose.
- 72-520. Industrial commission administrator of fund.
- 72-521. State treasurer custodian of fund — Duties.
- 72-522. Deposit and investment of fund — Interest.
- 72-523. Source of fund — Premium tax.
- 72-524. Sureties' reports of tax basis.
- 72-525. Civil action for collection of premium tax — Duties of attorney general.
- 72-526. Penalty for default — Collection by civil action — Duty of attorney general.
- 72-527. Civil penalty for surety's misrepresentation — Duty of attorney general.
- 72-528. Statistical information required.

**72-501. Creation of commission — Appointment, term of office — Qualifications — Affiliations — Effect of accepting appointment — Vacancies — Removal of member for cause.** — (1) A commission is hereby created to be known as the industrial commission consisting of three (3) members, to be appointed by the governor, with the approval of the senate. The industrial commission shall be, for the purposes of section 20, article IV, Idaho Constitution, an executive department of the state government.

(2) The term of each member of the commission shall be six (6) years, except that the members first appointed shall be those serving as members of the industrial accident board on the date this law becomes effective, each to hold office for the balance of his term for which appointed, to-wit, one (1) until the second Monday of January, 1973, one (1) until the second Monday of January, 1975, and one (1) until the second Monday of January, 1977. On the expiration of his term, an incumbent member may continue in tenure until his successor is appointed and qualified.

(3) No person shall be eligible to appointment as a member of the commission unless he shall be at least thirty (30) years of age, a qualified elector and a resident of this state not less than three (3) years consecutively next preceding his appointment, of good moral character and of previous experience and training to qualify him efficiently and justly to discharge the duties of his office.

(4) Not more than one (1) of the appointees to the commission shall be a person who, on account of his previous vocations, employment or affiliations can be classed as a representative of employers, and not more than one (1) of the appointees shall be a person who on account of his previous vocation, employment or affiliations can be classed as a representative of workmen. The third appointee shall be an attorney at law duly licensed to practice in this state. Not more than two (2) of the members of the commission shall belong to the same political party.

(5) During his tenure in office a member shall devote full time to his duties as a member of the commission. As an official exercising judicial functions, he shall not engage in partisan political activities and shall conform his conduct to commonly acceptable standards of judicial ethics.

(6) Any vacancy during a term may be filled by the governor with the approval of the senate. If any appointment is made during the recess of the legislature it shall be subject to confirmation by the senate during its next ensuing session.

(7) A member may be disciplined or removed or retired from office by the judicial council in accordance with the procedure prescribed in section 1-2103, Idaho Code, for any cause set forth therein, subject to the review procedure and disposition of such a proceeding by the Supreme Court as in said section provided. [I.C., § 72-501, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 9, § 1, p. 47.]

### STATUTORY NOTES

**Cross References.** — Jurisdiction of disputes under this law, § 72-707.

Reciprocal agreements, empowered to make, § 72-222.

Witnesses and evidence, powers, § 72-709.

**Compiler's Notes.** — The words "this law"

refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 3 of S. L. 1974, ch. 9 provided that the act should take effect on and after July 1, 1974.

### JUDICIAL DECISIONS

**Cited in:** *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Jurisdiction.

Nature of board.

#### Jurisdiction.

Although the industrial accident board was a tribunal of limited scope, it had general and exclusive original jurisdiction in the state field of industrial accidents. *Johnson v. Falen*, 65 Idaho 542, 149 P.2d 228 (1944).

The industrial accident board had exclusive jurisdiction of claim for injuries sustained by a minor aged 15 while working for a lumber company. *Lockard v. St. Maries Lumber Co.*, 76 Idaho 506, 285 P.2d 473 (1955).

#### Nature of Board.

The board was an administrative body exercising special judicial functions. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923), overruled on other grounds, *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982); *In re Bones*, 48 Idaho 85, 280 P. 223 (1929); *Golay v. Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939).

The industrial accident board was a statutory, and not a constitutional body. State ex



rel. *Taylor v. Robinson*, 59 Idaho 485, 83 P.2d 983 (1938).

The board was fundamentally a fact finding body. Its application of the law was incidental to its administrative function. It applied the

law to the facts as found by it, not to facts found by some other officer or agency. In re *Markham's, Inc.*, 79 Idaho 307, 316 P.2d 553 (1957).

### RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Worker's Compensation, §§ 44-46.

**C.J.S.** — 100 C.J.S., Workers' Compensation, § 700 et seq.

**72-501A. Rehabilitation division — Budget and expense — Composition and implementation.** — (1) In order to assist in reducing the period of temporary disability resulting from an injury and to aid in restoring the injured employee to gainful employment with the least possible permanent physical impairment, the commission shall establish within the commission a rehabilitation division and adopt a program concerning itself with both physical and vocational rehabilitation, the latter of which shall include job placement.

(2) The commission is authorized to budget and expend for such rehabilitation program such funds as may be paid into the industrial administration fund or rehabilitation account thereof by a special premium tax provided by law for this purpose.

(3) The composition of the rehabilitation division and implementation of the rehabilitation program shall be in the discretion of the commission with the counsel, advice, cooperation and expertise of representatives of industry, labor, sureties and the legal and medical professions as well as institutions, hospitals and clinics having physical rehabilitation facilities and with the assistance of the state board for professional-technical education, when such board is carrying out the duties of chapter 23, title 33, Idaho Code. [I.C., § 72-501A, as added by 1978, ch. 273, § 2, p. 637; am. 1999, ch. 329, § 42, p. 852.]

### STATUTORY NOTES

**Prior Laws.** — Former § 72-501A which comprised I.C., § 72-501A, as added by 1974, ch. 132, § 1, p. 1329; am. 1976, ch. 151, § 1, p. 545 was repealed by S.L. 1978, ch. 273, § 1.

**Effective Dates.** — Section 3 of S.L. 1978, ch. 273 declared an emergency. Approved March 29, 1978.

**72-502. References to industrial commission to include industrial accident board.** — The references in the Idaho Constitution, Idaho Code and Idaho Rules of Civil Procedure to the "industrial accident board" and "board" shall be deemed to be references to the industrial commission. [I.C., § 72-502, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Industrial commission defined, §§ 72-1309, 72-1403.

**72-503. Salary.** — Commencing July 1, 2006, the annual salary of each member of the industrial commission shall be eighty-two thousand nine hundred fifty-one dollars (\$82,951). Industrial commissioner salaries shall be paid from sources set by the legislature. Each member of the industrial commission shall devote full time to the performance of his duties. [I.C., 72-503, as added by 1986, ch. 79, § 1, p. 237; am. 1990, ch. 345, § 1, p. 930; am. 1996, ch. 257, § 3, p. 841; am. 1998, ch. 358, § 4, p. 1121; am. 2000, ch. 359, § 3, p. 1195; am. 2001, ch. 253, § 2, p. 918; am. 2004, ch. 281, § 3, p. 774; am. 2006, ch. 368, § 3, p. 1106.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-503 which comprised S.L. 1971, ch. 124, § 3, p. 422 was repealed by S.L. 1978, ch. 305, § 2.

**Amendments.** — The 2006 amendment, by ch. 368, substituted the current first sen-

tence for "Commencing July 1, 2004, the annual salary of each member of the industrial commission shall be eighty thousand five hundred thirty-five dollars (\$80,535)."

**72-504. Organization — Chairman — Secretary.** — The members of the commission shall select one (1) of their members as chairman, and shall select a person qualified, in the judgment of the commission, by experience and training, as secretary, who need not be a member, each of whom shall perform such duties as in this law prescribed and as the commission may from time to time direct. [I.C., § 72-504, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-505. Quorum — Majority to act — Effect of vacancy.** — (1) Quorum. A majority of the commission shall constitute a quorum for the transaction of business.

(2) Act of commission by majority. The act of a majority of the commission when in sessions as the commission shall be deemed to be the act of the commission.

(3) Effect of vacancy. A vacancy on the commission shall not impair the right of the remaining members to perform the duties and exercise all the power and authority of the commission. [I.C., § 72-505, as added by 1971, ch. 124, § 3, p. 422.]

**72-506. Acts of commission or reference — Hearing officers.** — (1) Any investigation, inquiry or hearing which the commission has power to undertake or hold may be undertaken or held by or before any member thereof or any hearing officer, referee or examiner appointed by the commission for that purpose.

(2) Every finding, order, decision or award made by any member, hearing officer, referee, or examiner pursuant to such investigation, inquiry or hearing, when approved and confirmed by the commission, and ordered filed



in its office, shall be deemed to be the finding, order, decision or award of the commission. [I.C., § 72-506, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Assignment for hearing, § 72-712. Assignment for safety hearing, § 72-722.

### JUDICIAL DECISIONS

#### ANALYSIS

Appeal.  
Approval of findings required.  
Decisions of referee.

#### Appeal.

Claimant could not appeal referee's denial of his request to reopen his workers' compensation case because the industrial commission did not approve and confirm the denial; order was not appealable because it was not an order of the Commission, but only of the referee. Section 72-718 provides a procedure by which a party may seek a ruling by the Commission on a matter decided by a referee that was not confirmed or approved by the Commission in its approval, confirmation, and adoption of the referee's findings and conclusions. *Wheaton v. Industrial Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

#### Approval of Findings Required.

A finding or award of a referee is not final and binding on the industrial commission, since the findings and awards are not deemed to be those of the commission until they have been approved and confirmed by that body. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 975 P.2d 1178 (1999).

Findings of fact made by the referee are, under subsection (2) of this section and § 72-717, merely recommendations to the state industrial commission which, upon reviewing those findings, can either adopt them or enter its own findings. *Lorca-Merono v. Yokes Wash. Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002).

#### Decisions of Referee.

The industrial commission's decision was vacated where the commission refused to address the referee's decisions as requested in defendant's motion for reconsideration. *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000).

Worker failed to preserve an objection to the denial of his motion for a continuation; since the referee's interlocutory order denying the motion was not adopted by the industrial commission, it was not part of the final appealable order. *Ball v. Daw Forest Prods. Co.*, 136 Idaho 155, 30 P.3d 933 (2001).

**Cited in:** *State ex rel. Industrial Comm'n v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000).

**72-507. Seal.** — The commission shall have a seal of which the secretary shall be custodian, bearing the following inscription: "Industrial Commission, State of Idaho, seal." The seal shall be affixed to all writs, orders, awards, authentications of copies of records and to such other instruments as the commission shall direct. [I.C., § 72-507, as added by 1971, ch. 124, § 3, p. 422.]

**72-508. Authority to adopt rules and regulations.** — Pursuant to the provisions of chapter 52, title 67, Idaho Code, the commission shall have authority to promulgate and adopt reasonable rules and regulations for effecting the purposes of this act. Notwithstanding the provisions of chapter 52, title 67, Idaho Code, the commission shall have authority to promulgate and adopt reasonable rules and regulations involving judicial matters. In administrative matters and all other matters, the commission shall be bound by the provisions of chapter 52, title 67, Idaho Code. Rules and regulations as promulgated and adopted, if not inconsistent with law, shall

be binding in the administration of this law. [I.C., § 72-508, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 70, § 1, p. 1151; am. 1976, ch. 264, § 1, p. 889.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" and "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### ANALYSIS

Attorney fees.

—Guidelines.

Class actions.

Commission's actions.

—Beyond authority.

Failure to comply with rules.

Procedural rules.

### Attorney Fees.

#### —Guidelines.

Without properly enacted guidelines it is impossible for the commission to exercise its duty to approve undisputed attorney fees under IC § 72-803. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

#### Class Actions.

Although the industrial commission has the power to adopt a rule which would permit a class action proceeding before it, it has not chosen to adopt such a rule and this inaction does not constitute a denial of due process; accordingly, commission's order stating that it did not have authority to entertain class action was affirmed. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

#### Commission's Actions.

As a creature of legislative invention, the commission may only act pursuant to an enumerated power, whether it be directly statutory or based upon rules and regulations properly issued by the commission under this section. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

#### —Beyond Authority.

In acting beyond the bounds of its statutory authority by sua sponte modifying appellants' uncontested attorney fee agreements the commission has acted arbitrarily and capriciously and has manifestly abused its discretion. These abuses have bred discomfort and uncertainty in appellants and other attorneys. Without clear guidelines nestled in appropriately promulgated regulations, attorneys' actions are plagued by doubt, which may have a chilling effect on the underlying purpose of the Workers' Compensation Act that the com-

mission is constrained to promote under this section. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

In sua sponte reducing appellants' uncontested attorney fee agreements without suitable advance notice to all of the parties directly involved, accomplished through properly enacted regulations, and without a meaningful hearing, the commission has acted in disregard of important constitutional mandates. The net result of the commission's sua sponte conduct is a deprivation of appellants' property rights under the fee agreement without due process of law. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

Subdivision (2) of § 72-706 allows a claimant to apply for a hearing against an employer within five years from the date of the accident causing the injury or the date of first manifestation of an occupational disease. A dismissal with prejudice prior to the expiration of the five-year period when a claimant sought a dismissal without prejudice would be inconsistent with the claimant's right to apply for a hearing within five years; this would violate the authority given to the Commission in this section to adopt judicial rules "not inconsistent with law." *Burton v. State, Indus. Indem. Fund*, 125 Idaho 830, 875 P.2d 927 (1994).

#### • Failure to Comply with Rules.

Entry of default judgment because of employer's inadvertent failure to answer within the time period allowed was not a due process violation. *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974).

#### Procedural Rules.

Rule promulgated by the commission requiring that an answer must be filed within



20 days from date of service of application for hearing was within commission's power. *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 528 P.2d 903 (1974).

Rule adopted under the authority of this section by the Idaho industrial commission did not preclude approval of a stipulation to dismiss with prejudice, signed by plaintiff

employee and defendant employer, or require a hearing. *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005).

**Cited in:** *Cantu v. J.R. Simplot Co.*, 121 Idaho 585, 826 P.2d 1297 (1992); *Rhodes v. Indus. Comm'n*, 125 Idaho 139, 868 P.2d 467 (1993).

**72-509. Offices and supplies.** — (1) The principal office of the commission shall be located in Ada county.

(2) The commission may establish such branch offices, divisions, sections and advisory committees in such localities in this state as it deems necessary to administer this act, in addition to the offices and committees herein otherwise provided for, and shall have power to rent temporary quarters deemed requisite for the purpose of administering this law.

(3) The commission may acquire office furniture, furnishings, equipment, stationery and supplies deemed requisite for the purpose of administering this law. [I.C., § 72-509, as added by 1971, ch. 124, § 3, p. 422; am. 2001, ch. 183, § 37, p. 613.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" and "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-510. Payment of expenses.** — The commission shall make such expenditures as may be necessary for the adequate administration of this law, including salaries, other personal services, actual and necessary traveling and other expenses and disbursements of the members of the commission, its officers and employees, incurred while on official business, either within or without the state, office rent, the purchase and rental of vehicles, books, periodicals, office equipment and supplies, printing and binding, cost of membership in official organizations, attendance at meetings and conventions and for all other purposes concerned with subject matters cognizable within this law. All expenditures of the commission, unless otherwise provided in this law, shall be paid out of the industrial administration fund after approval by the board of examiners. [I.C., § 72-510, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — Sources of industrial administration fund: Compensation to state as *parens patriae*, § 72-420; fees, § 72-515; creation and other sources of industrial administration fund, §§ 72-519 — 72-523;

penalties, §§ 72-319, 72-525 — 72-527, 72-723.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-511. Records and forms.** — The commission shall cause to be printed such blank forms as it shall deem requisite to facilitate or promote the efficient administration of this law. It shall provide a book in which shall

be entered the minutes of all its proceedings, a book of record in which shall be recorded all awards, and such other books or records as it shall deem requisite for the purposes and efficient administration of this law. All such records shall be kept in the office of the commission. [I.C., § 72-511, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-512. Reports.** — The commission shall have the power and authority to publish and distribute at its discretion from time to time, in addition to its annual report, such further reports and bulletins covering its operation, proceedings and matters relative to its work as it may deem advisable. [I.C., § 72-512, as added by 1971, ch. 124, § 3, p. 422.]

**72-513. Specified employees — Exempt from personnel system.** — The secretary, medical officers, division or section officers, hearing officers, field counselors, examiners and referees, shall be exempt from the system of personnel administration prescribed by chapter 53, title 67, Idaho Code. Field counselors shall not be deemed or considered social workers or engaged in social work. [I.C., § 72-513, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 132, § 7, p. 1329.]

**72-514. Assistants.** — The commission shall have the power to employ during its pleasure such additional officers, experts, engineers, statisticians, accountants, inspectors, clerks and employees as it may deem necessary to carry out the provisions of this law or to perform the duties and exercise the powers conferred by law upon the commission. [I.C., § 72-514, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-515. Fees.** — The commission shall have power and authority to fix, charge and collect fees, as follows:

- (1) For copies of papers and records not required to be certified or otherwise authenticated by the commission;
- (2) For certified copies of official documents and orders filed in its offices;
- (3) For copies of the evidence taken at any proceeding furnished any person other than the claimant or the employer; transcripts of evidence shall be furnished the claimant and the employer on request;
- (4) For publications issued under its authority.

The fees charged and collected under this section shall be deposited monthly in the state treasury to the credit of the industrial administration



fund, accompanied by a detailed statement. [I.C., § 72-515, as added by 1971, ch. 124, § 3, p. 422.]

**72-516. Reports.** — (1) Biennially the commission shall make a report to the governor and through him to the state legislature on the operation of this law, including recommendations as to improvements in the law and administration thereof, and a statistical analysis of industrial injury and occupational disease experience and compensation costs.

(2) The commission may prepare and publish such other statistical and informational reports and analyses based upon the reports and records available which, in its opinion, will be useful in attaining public understanding of the purposes, effectiveness, costs, coverage and administrative procedures of workmen's compensation and rehabilitation in the state, and in providing basic information regarding the occurrence and sources of industrial injuries and occupational diseases for the use of public and private agencies engaged in industrial injury and occupational disease prevention activities. [I.C., § 72-516, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-517. Cooperation with other agencies.** — The commission shall have the authority to enter into cooperative agreements with the director of the department of labor, the administrator of the division of building safety, the director of the department of health and welfare, state board of education, state board for professional-technical education, state nuclear energy commission, and with other state agencies and with their successors, and with federal and private agencies, and to cooperate with programs sponsored by all such agencies to facilitate the carrying out of the purposes of this law. [Added 1971, ch. 124, § 3, p. 422; am. 1974, ch. 9, § 2, p. 47; am. 1996, ch. 421, § 74, p. 1445; am. 1999, ch. 329, § 28, p. 868.]

#### STATUTORY NOTES

**Cross References.** — State nuclear energy commission, duty to cooperate with, § 39-3004.

Vocational rehabilitation board, duty to cooperate with, § 33-2304.

**Compiler's Notes.** — The words "this law"

refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 3 of S. L. 1974, ch. 9 provided the act should take effect on and after July 1, 1974.

#### JUDICIAL DECISIONS

**Cited in:** Reifsteck v. Lantern Motel & Cafe, 101 Idaho 699, 619 P.2d 1152 (1980).

**72-518. Duties of attorney general — Representation in court.** — (1) In any civil action to enforce the provisions of this law, or of any rule or

regulation issued pursuant thereto, the commission and the state shall be represented by the attorney general, or if an action is brought in any court of any other state, by any attorney qualified to appear in the courts of that state.

(2) Any criminal action for violation of any provision of this law or of any rule or regulation issued pursuant thereto shall be prosecuted by the attorney general, or, at his request and under his direction, by the prosecuting attorney of any county wherein the defendant resides or has a place of business. [I.C., § 72-518, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Other provisions assigning duties to attorney general: On appeals, §§ 72-724 — 72-733; collection of premium tax and penalty, §§ 72-525, 72-526; collection of penalty for carrier's misrepresentation, § 72-527.

Civil actions on relation of board: Collection of penalty on failure to secure compensation and injunction for continued default, § 72-

319; collection of premium tax and penalty, §§ 72-525, 72-526; collection of penalty for carrier's misrepresentation, § 72-527; enforcement of penalty for violation of safety order, § 72-723.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-519. Creation of industrial administration fund — Purpose.** — A fund is hereby created to be known as the industrial administration fund for the purpose of providing funds for administering the workmen's [worker's] compensation law. [I.C., § 72-519, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "workmen's [worker's] compensation law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

The bracketed word "worker's" was inserted by the compiler.

### RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 47-49.

**C.J.S.** — 100 C.J.S., Workers' Compensation, § 646 et seq.

**72-520. Industrial commission administrator of fund.** — The industrial administration fund shall be administered by the commission without liability on the part of the state or the commission beyond the amount of the fund. The commission is authorized to credit or remit, refund or pay back any premium tax or penalty or portion thereof paid under this act which the commission determines was paid or collected erroneously or illegally. [I.C., § 72-520, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 15, p. 572.]

**72-521. State treasurer custodian of fund — Duties.** — The state treasurer shall be custodian of the industrial administration fund. He shall give a separate and an additional bond in an amount and with sureties approved by the commissioner of insurance, conditioned for the faithful



performance of his duty as custodian of this fund. [I.C., § 72-521, as added by 1971, ch. 124, § 3, p. 422.]

**72-522. Deposit and investment of fund — Interest.** — The state treasurer shall deposit or, on order of the commission, invest any portion of the industrial administration fund not needed for immediate or currently anticipated use, in the manner and subject to all the provisions of law respecting the depositing and investing of state funds by him. Interest earned by such portion of the fund so invested shall be collected by the state treasurer and placed to the credit of the fund. [I.C., § 72-522, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Compiler's Notes.** — Section 72-326 is an identical section that apparently was intended to apply to industrial special indemnity fund.

**72-523. Source of fund — Premium tax.** — The state insurance fund, every authorized self-insurer and every surety authorized under the Idaho insurance code or by the director of the department of insurance to transact worker's compensation insurance in Idaho, in addition to all other payments required by statute, shall semiannually, within thirty (30) days after February 1 and July 1 of each year, pay into the state treasury to be deposited in the industrial administration fund a premium tax as follows:

(1) Commencing July 1, 1993, every surety, other than self-insurers authorized to transact worker's compensation insurance, a sum equal to two and one-half percent (2.5%) of the net premiums written by each respectively on worker's compensation insurance in this state during the preceding six (6) months' period, but in no case less than seventy-five dollars (\$75.00); and

(2) Each self-insurer, a sum equal to two and one-half percent (2.5%) of the amount of premium such employer who is a self-insurer would be required to pay as premium to the state insurance fund, but in no case less than seventy-five dollars (\$75.00).

(3) Any insurer making any payment into the industrial administration fund under the provisions of subsection (1) of this section shall be entitled to deduct one and three-tenths percent (1.3%) of the net premiums written as computed above from any sum that it is required to pay into the department of insurance as a tax on worker's compensation premiums.

(4) In arriving at net premiums written, dividends paid, declared or payable shall not be deducted.

(5) For the purposes of this section and section 72-524, Idaho Code, net premiums written shall mean the amount of gross direct premiums written, less returned premiums and premiums on policies not taken. [I.C., § 72-523, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 132, § 8, p. 1329; am. 1978, ch. 264, § 16, p. 572; am. 1984, ch. 90, § 1, p. 189; am. 1990, ch. 253, § 1, p. 725; am. 1993, ch. 202, § 1, p. 556.]

## STATUTORY NOTES

**Cross References.** — Civil action for collection of defaulted payment, §§ 72-525, 72-526.

Expenses payable therefrom, § 72-510.

Other accretions to fund: Death benefits when deceased workman has no dependents, § 72-420. Fees, § 72-515.

Regulation of premium rates of state insurance fund, § 72-913.

State insurance fund, §§ 72-901 — 72-928.

**Compiler's Notes.** — The Idaho insurance code referred to in this section is S.L. 1961, ch. 330 which is compiled throughout Title 41 of the Idaho Code.

**72-524. Sureties' reports of tax basis.** — Every surety, other than a self-insurer shall, under oath of the person or officers making the report, within thirty (30) days after February 1 and July 1 of each year, report to the commission the net amount of premium written on worker's compensation insurance in this state during the preceding six (6) months' period, and every self-insurer shall, within thirty (30) days after February 1 and July 1 of each year, report in the same manner to the commission the total payroll for the preceding six (6) months' period. The commission shall have the right, at any time and as often as it requires, to verify the worker's compensation premiums written by any surety, and to inspect or cause to be inspected the records of any surety underwriting or authorized to underwrite worker's compensation liability in the state of Idaho for premiums written verification purposes. Failure of any such surety to allow such verification or inspection shall constitute sufficient cause enabling the commission to revoke such surety's authority to underwrite worker's compensation liability of any and all employers located, or doing business, in the state of Idaho. [I.C., § 72-524, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 208, § 5, p. 1538; am. 1978, ch. 264, § 17, p. 572; am. 1990, ch. 253, § 2, p. 725.]

**72-525. Civil action for collection of premium tax — Duties of attorney general.** — If any surety required to make payment under the provisions of this law shall fail, for a period of ten (10) days after such payment is due as provided by section 72-523, to pay into the state treasury to be deposited in the industrial administration fund the amount due, it shall be the duty of the attorney general to bring a civil action in the name of the state in the proper court to collect the amount due, and the amount collected shall be paid into the state treasury to be deposited in the industrial administration fund. [I.C., § 72-525, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-526. Penalty for default — Collection by civil action — Duty of attorney general.** — Any surety who is in default for ten (10) days in any payment required to be made under the provisions of this law shall be liable for a penalty for every ten (10) day period or any part thereof during which



such failure continues of ten percent (10%) of the amount originally due. It shall be the duty of the attorney general to bring a civil action in the name of the state in the proper court to collect the penalty herein provided, and the amount collected shall be paid into the state treasury to be deposited in the industrial administration fund. [I.C., § 72-526, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — General duties of attorney general, § 72-518. refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Compiler's Notes.** — The words "this law"

**72-527. Civil penalty for surety's misrepresentation — Duty of attorney general.** — Any surety who shall wilfully misrepresent the amount to be paid into the state treasury under the provisions of this law shall be liable to the state for an amount ten (10) times the difference between the payment made and the amount that should have been paid had such misrepresentation not been made; the liability to the state under this section shall be enforced in a civil action brought by the attorney general in the name of the state in the proper court, and the amount collected shall be paid into the state treasury to be deposited in the industrial administration fund. [I.C., § 72-527, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — False representation a misdemeanor, § 72-801.

General duties of attorney general under Workmen's Compensation Law, § 72-518.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**72-528. Statistical information required.** — (1) Statistical information now provided to the industrial commission is inadequate and incomplete, making it impossible to compute the total cost of the workmen's compensation system, both to employers and the people of the state of Idaho.

(2) In addition to all information that sureties, self-insurers, the state insurance fund, the industrial special indemnity fund and noninsured employers now supply to the industrial commission, they shall be required to report to the industrial commission all litigation expenses paid by them in any case litigated before the industrial commission, and if appealed to a higher court, all costs expended on appeal. This reporting requirement shall include all fees paid to attorneys, all expenses charged by attorneys, charges for reports or testimony of witnesses, costs of any depositions taken, any costs for investigation made before or during the hearing, costs of research or legal briefs, and all filing fees paid on account of the litigation.

(3) All attorneys engaged in representing any claimant in any litigated workmen's compensation claim must report to the industrial commission all attorney fees and all expenses which were incurred in the litigation and charged to the claimant. This requirement shall extend to any appeal or appeals that may be taken to a higher court by or on behalf of the claimant.

(4) The industrial commission may expand the forms presently used by sureties or employers providing workmen's compensation coverage under the law by adding appropriate space or spaces to provide the additional information required in this section.

(5) The industrial commission shall supply all attorneys representing claimants with a form upon which a report in compliance with this section can be made.

(6) Reports required hereunder must be filed with the industrial commission not later than thirty (30) days following the time of entry of an award by the industrial commission; in the event of an appeal to a higher court, not later than thirty (30) days following a final ruling by the court.

(7) The industrial commission may make such rules as are necessary to require compliance with the provisions of this section, including refusing to allow attorneys who fail to comply with the provisions of this section the right to appear before the industrial commission.

(8) The provisions of this section shall apply to all cases in which an application for hearing is filed with the industrial commission on or after July 1, 1988. [I.C., § 72-528, as added by 1988, ch. 357, § 1, p. 1059.]

## CHAPTER 6

### EMPLOYER'S REPORTS

#### SECTION.

72-601. Record of injuries — Necessity — Availability — Failure to keep.  
72-602. Employers' notice of injury and reports.

#### SECTION.

72-603. Employers' report of employees.  
72-604. Failure to report tolls employee limitations.

**72-601. Record of injuries — Necessity — Availability — Failure to keep.** — (1) Employers' records of injuries. An employer shall keep a record of each injury and occupational disease fatal or otherwise, arising out of and in the course of employment, reported to the employer or of which he otherwise may have knowledge. Such record shall include a description of the injury or disease and the manner in which the same occurred, a statement of the time during which an employee was unable to work because of the affliction and such other information as the commission may require to be kept.

(2) Failure to keep records a misdemeanor. Any employer who wilfully fails or refuses to keep records of injuries and occupational diseases as required by this section shall be guilty of a misdemeanor. [I.C., § 72-601, as added by 1971, ch. 124, § 3, p. 422.]

### JUDICIAL DECISIONS

**Cited in:** Hite v. Kulhenak Bldg. Contractor, 96 Idaho 70, 524 P.2d 531 (1974).

**72-602. Employers' notice of injury and reports.** — (1) First report — Notice of injury or occupational disease. As soon as practicable but not later than ten (10) days after the occurrence of an injury or occupational



disease, requiring treatment by a physician or resulting in absence from work for one (1) day or more, a report thereof shall be made in writing by the employer to the commission in the form prescribed by the commission; the mailing to the commission of the written report within the time prescribed shall be compliance.

(2) Extended disability — Sixty (60) day supplemental and final reports. If the disability extends beyond a period of sixty (60) days, the employer shall make a supplemental report to the commission at the end of such period, in the form prescribed by the commission, that the employee is still disabled.

(3) Supplemental report on termination of disability. Upon termination of the disability of the employee, the employer shall make a final supplemental report to the commission, in the form prescribed by the commission.

(4) Summary of compensation and medical services, paid and payable. Within such time, and under such conditions, as the commission shall prescribe by rule or regulation, but not more often than sixty (60) days after the termination of the disability of the employee, the employer or other party liable to pay the compensation provided for by this act shall file with the commission a summary showing the total compensation payments made or to be made for such employee. The time prescribed by the commission for the filing of such summaries may be different for medical and related benefit cases only as over against cases in which monetary benefits have been made to any such employee.

(5) Failure to file report a misdemeanor. An employer who willfully fails or refuses to make any report required by this section shall be guilty of a misdemeanor. [I.C., § 72-602, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 18, p. 572.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### ANALYSIS

Report not required.  
Statutory limitations.

### Report not Required.

The requirement that the employer file a report under subsection (1) of this section is triggered by an injury requiring treatment by a physician or the employee's absence from work for one day or more, and where claimant did not miss any work as a result of his accident, and did not consult a physician until more than a year had passed the employer was not required to file a report with the Industrial Commission. *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

### Statutory Limitations.

The one-year statute of limitations in § 72-701 would not bar claimant's delayed claim for benefits under the terms of § 72-604 if the employer had knowledge of the injury and willfully failed to file a report as required by this section. *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

**Cited in:** *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977); *Johnson v. Amalgamated Sugar Co.*, 108 Idaho 765, 702 P.2d 803 (1985).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Report as evidence.  
Statutory limitations.

**Report as Evidence.**

On appeal from an order of the industrial accident board denying compensation, the employer's report of the accident could be considered, though it was not formally offered in evidence at a hearing before the board. *Sater v. Home Lumber & Coal Co.*, 63 Idaho 776, 126 P.2d 810 (1942).

An employer's report of an accident or notice of death of an employee was not prima facie evidence of an accidental injury. *Walters v. Weiser*, 66 Idaho 615, 164 P.2d 593 (1945).

The report of the employer, showing the nature of the injury, constituted prima facie evidence that the accident and injury was as

so reported. *Teater v. Dairymen's Co-op. Creamery*, 68 Idaho 152, 190 P.2d 687 (1948).

Printed "Report of employer" which listed claimant as an employee was a factor to consider in determining relationship of parties. *Wilcox v. Swing*, 71 Idaho 301, 230 P.2d 995 (1951).

**Statutory Limitations.**

The statutory limitations for filing of claim and filing of petition for a hearing were not extended by the statute, since latter provision merely provided for assessment of a penalty for failure of employer to make accident reports to the board. *Arnold v. Claude Lacey & Son*, 73 Idaho 1, 245 P.2d 398 (1952).

**72-603. Employers' report of employees.** — Requirement to keep records and to report. Subject to the provisions of this law, every employer shall keep an accurate record of the number and job classification of his employees and the wages paid, and upon demand of the commission shall furnish the commission a sworn statement of the same. Such records shall not be open to inspection except on request of the commission. The commission shall have the right, at any time and as often as it requires, to verify the number of employees and the amount of the payroll, and to inspect or cause to be inspected such records.

Information received from employers shall be subject to disclosure as provided in chapter 3, title 9, Idaho Code. [I.C., § 72-603, as added by 1971, ch. 124, § 3, p. 422; am. 1990, ch. 213, § 106, p. 480.]

## STATUTORY NOTES

**Cross References.** — Analogous provision as to records of state fund, § 72-926.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**Effective Dates.** — Section 111 of S.L.

1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**72-604. Failure to report tolls employee limitations.** — When the employer has knowledge of an occupational disease, injury, or death and willfully fails or refuses to file the report as required by section 72-602(1), Idaho Code, the notice of change of status required by section 72-806, Idaho Code, the limitations prescribed in section 72-701 and section 72-706, Idaho Code, shall not run against the claim of any person seeking compensation until such report or notice shall have been filed. [I.C., § 72-604, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 144, § 2, p. 325.]



## JUDICIAL DECISIONS

## ANALYSIS

Application.  
Willful failure.

**Application.**

The failure of the employer to file a report of the occupational disease, as required by subsection (1) of § 72-602, does not operate to toll the limitation imposed by § 72-448, as this section does not apply to time limitations for filing claims arising from an occupational disease under § 72-448. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

**Willful Failure.**

The Industrial Commission correctly found that employer's failure to file the § 72-602 report was not willful, where the claimant's doctor's note contained no specific language indicating that claimant's underlying condi-

tion was caused by her work environment, and the employer's failure to draw an inference to the contrary from the note was a simple misunderstanding of the doctor's intent in issuing the note. Thus, even if this section were applicable to § 72-448, the time limitations would not be tolled, as this section only tolls limitations for willful failure to report. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

The one-year statute of limitations in § 72-701 would not bar claimant's delayed claim for benefits under the terms of this section if the employer had knowledge of the injury and willfully failed to file a report as required by § 72-602(1). *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

## CHAPTER 7

## PROCEDURES

## SECTION.

- 72-701. Notice of injury and claim for compensation for injury — Limitations.
- 72-702. Form of notice and claim.
- 72-703. Giving of notice and making of claim.
- 72-704. Sufficiency of notice — Knowledge of employer.
- 72-705. Limitation of time — Minors and incompetents.
- 72-706. Limitation on time on application for hearing.
- 72-707. Commission has jurisdiction of disputes.
- 72-708. Process and procedure.
- 72-709. Attendance of witnesses — Production of documents — Deposition — Witness fees.
- 72-710. Transcripts of proceedings.
- 72-711. Compensation agreements.
- 72-712. Hearings.
- 72-713. Notice of hearings — Service.
- 72-714. Hearings, where and how conducted.
- 72-715. Disobedience to commission's directive process.
- 72-716. Record of proceedings — Service of order or award.
- 72-717. Effect of decision by one member or assigned officer — Claim for review.

## SECTION.

- 72-718. Finality of commission's decision.
- 72-719. Modification of awards and agreements — Grounds — Time within which made.
- 72-720. Powers of commission — Safety.
- 72-721. Rules for safety — Protective appliances.
- 72-722. Unsafe conditions — Procedure — Warning order — Safety inspection — Hearing — Decision.
- 72-723. Violation of safety order a misdemeanor.
- 72-724. Appeal to Supreme Court.
- 72-725. Record on appeal.
- 72-726 — 72-730. [Repealed.]
- 72-731. Stay on appeal.
- 72-732. Disposition of appeal — Jurisdiction of Supreme Court.
- 72-733. Limited jurisdiction of courts.
- 72-734. Interest on compensation awards.
- 72-735. Enforcement of award — Filing in district court — Duty of court to enter judgment.
- 72-736. District court judgment non-appealable — A lien upon execution.
- 72-737. Revision of district court's judgment upon modification of award by commission.

**72-701. Notice of injury and claim for compensation for injury — Limitations.** — No proceedings under this law shall be maintained unless

a notice of the accident shall have been given to the employer as soon as practicable but not later than sixty (60) days after the happening thereof, and unless a claim for compensation with respect thereto shall have been made within one (1) year after the date of the accident or, in the case of death, then within one (1) year after such death, whether or not a claim for compensation has been made by the employee. Such notice and such claim may be made by any person claiming to be entitled to compensation or by someone in his behalf. If payments of compensation have been made voluntarily or if an application requesting a hearing has been filed with the commission, the making of a claim within said period shall not be required. [I.C., § 72-701, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 19, p. 572.]

### STATUTORY NOTES

**Cross References.** — Failure to give notice will not defeat a claim where the employer had actual knowledge or where his rights were not prejudiced by lack of such notice, § 72-704.

Presumption of sufficient notice where employee is killed or physically or mentally unable to testify, § 72-228.

Sufficiency of notice, § 72-704.

Voluntary payment, § 72-316.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### ANALYSIS

Application.

Construction.

Construction with other law.

Constructive notice.

Delayed claim.

Delayed notice.

Knowledge of accident.

Manifestation of disease.

Notice requirement.

—Notice to commission.

—Notice to surety.

Requirements.

Timely claim.

Timely notice.

Tolling of limitations.

Untimely claim.

Untimely notice.

#### Application.

By its express language, this section applies to claims arising from accidents, not to claims for disability arising from an occupational disease; the applicable statute of limitations for claims for disability resulting from occupational disease is § 72-448. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

The final sentence of this section was intended to apply only in situations where the employer acknowledges liability for the injury at issue and voluntarily pays benefits for that injury. This provision, however, was not in-

tended to address the abrupt discontinuation of benefits such as in the instant case, where the employer or surety ceases payments of benefits to contest liability. *Williamson v. Whitman Corporation/Pet*, 130 Idaho 602, 944 P.2d 1365 (1997).

#### Construction.

The worker's compensation statutes contain no provision, such as § 72-704 which preserves claims despite untimely notice of the accident to the employer in certain circumstances, that excuses the late filing of a claim. *Williamson v. Whitman Corporation/*



Pet, 130 Idaho 602, 944 P.2d 1365 (1997).

### **Construction with other law.**

In a situation where compensation abruptly ceases, section 72-706, not this section, is triggered. *Williamson v. Whitman Corporation/Pet*, 130 Idaho 602, 944 P.2d 1365 (1997).

### **Constructive Notice.**

Where employer had fully investigated the accident which caused employee's injury, employer was not prejudiced or rendered less capable of resisting employee's claim by the lack of proper notice of employee's injury. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

Where employer through its personnel manager had actual knowledge of the accident causing employee's injury a short time after its occurrence, employer could not contend that employee's claim was barred for lack of timely notice. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

### **Delayed Claim.**

The one-year statute of limitations in this section would not bar claimant's delayed claim for benefits under the terms of § 72-604 if the employer had knowledge of the injury and willfully failed to file a report as required by § 72-602(1). *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

### **Delayed Notice.**

Where claimant sought to justify 266 days between the date of the alleged accident and the filing of notice of injury by claiming that there would have been no change in either the surety's investigation or in the medical treatment claimant received had timely notice been given, claimant failed to discharge his obligation of proving that employer and surety either had knowledge of the accident or were not prejudiced by the failure to give prompt notice. *Kennedy v. Evergreen Logging Co.*, 97 Idaho 270, 543 P.2d 495 (1975).

### **Knowledge of Accident.**

Failure to discharge the statutory obligation of proving that the employer either had knowledge of the accident or was not prejudiced by the failure to give notice is a complete bar to an award of compensation. *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979).

The policy reason behind § 72-704 is to notify the employer of potential claims but at the same time preserve claims despite lack of notice where the employer had actual knowledge or is not prejudiced by lack of notice. That policy is inapplicable to the requirement that a claim be filed with the industrial commission within a certain time after the accident. *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

Idaho industrial commission erred in con-

cluding that the claimant's request for workers' compensation benefits was barred by her failure to give proper notice to her employer under §§ 72-701 through 72-703; under § 72-704, the employer had actual knowledge of the injury. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005).

### **Manifestation of Disease.**

The term "manifestation," as it appears in this section, is used exclusively in reference to diseases. *Smith v. IML Freight, Inc.*, 101 Idaho 600, 619 P.2d 118 (1980) (decision under statute prior to 1978 amendment).

### **Notice Requirement.**

#### **—Notice to Commission.**

A claimant is not required to provide notice of a claim to the commission under this section, and where a claimant gave oral notice to her employer of her accident within sixty days of the accident and gave notice of her claim to the employer's insurance provider the claimant satisfied the notice requirements of this section. *Tonahill v. Legrand Johnson Constr. Co.*, 131 Idaho 737, 963 P.2d 1174 (1998).

#### **—Notice to Surety.**

As required by this section, "notice" is to be given to the employer and there is no additional requirement that notice be given to the surety. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

### **Requirements.**

This section and case law make clear that a claim must be filed within one year of the date of the industrial accident, regardless of the date the injury manifests itself or the date the extent of the injury becomes known. *Williamson v. Whitman Corporation/Pet*, 130 Idaho 602, 944 P.2d 1365 (1997).

### **Timely Claim.**

Where a claimant's decedent died on April 5, 1974 and the claimant filed a claim for compensation on April 3, 1975, she met the one-year requirement of this section. *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977).

Where a claimant filed, within one year of his accident, a form entitled "Application for Hearing," the completed form was sufficient to constitute both a written claim for compensation and an application for a hearing so that the claim was not barred under this section. *Hattensburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977).

### **Timely Notice.**

In employer's appeal from order of commission awarding injured employee income benefits and travel and medical expenses, employer could not contend that record did not disclose timely notice of the accident, where

employer had admitted in its answer to claimant's application for a hearing that it had received timely notice of the accident. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

Where the claimant's decedent died on April 5, 1974 and the claimant gave notice of injury to the employer on May 22, 1974, she met the 60-day requirement of this section. *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977).

### **Tolling of Limitations.**

Paying of medical benefits to a workmen's compensation claimant tolled the one-year statute of limitations for filing an application for additional benefits. *Ryen v. City of Coeur d'Alene*, 115 Idaho 791, 770 P.2d 800 (1989).

### **Untimely Claim.**

Where claimant failed to file his claim for compensation within the one-year time period from the date of his fall from the rear of a truck-tractor on which he had been working, the claim was barred by the statute of limitations, even though his condition was initially diagnosed and treated as osteoarthritis and thus claimant did not know he had a compensable claim for a herniated disc until long past the time for filing his claim. *Smith v. IML Freight, Inc.*, 101 Idaho 600, 619 P.2d 118 (1980).

Where an injured claimant fails to meet the time requirements of this section and his claims against the employer-surety are barred, the Industrial Special Indemnity Fund obtains the benefit of that preclusion. *Waltman v. Associated Food Stores, Inc.*, 109 Idaho 273, 707 P.2d 384 (1985).

### **Untimely Notice.**

The commission's finding that claimant failed to give timely notice of his accident to the employer was correct, where the record indicated that the employer did not learn that claimant was claiming a work-related accident until some time after June 7, approximately four months after the date of the accident, and where prior to that time claimant had not filed an accident report with his employer, even though his position as ware-

house foreman required him to participate in and become familiar with the plant's safety program, including its policy of reporting every accident regardless of how minor it might be. *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979).

Injured worker, despite having given oral notice to his employer of his injury at the time it occurred, may not recover worker's compensation benefits if he did not file a Notice of Injury and Claim for Benefits with the industrial commission within the time limit prescribed by statute. *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

Injury was not compensable where the industrial commission determined that the claimant, a flagger on highway construction sites, did not report the accident to her employer within the 60 day period required by law, that the alleged accident did not occur, and that claimant's concededly debilitated condition was not sufficiently causally related to any incident that occurred during the course of her employment for it to be compensable. *Becker v. Flaggers*, 120 Idaho 521, 817 P.2d 187 (1991).

Worker's compensation claimant's vague statement to her supervisor "I was having problems with my back" was ambiguous and insufficient to give the required notice of an accident and injury under this section and § 72-702, particularly in view of her prior history of back problems. *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995).

Plaintiff admitted that she did not give written notice of her injuries until 73 to 80 days after the second accident, therefore written notice was not timely under this section. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998).

**Cited in:** *Hazen v. General Store*, 111 Idaho 972, 729 P.2d 1035 (1986); *Blackwell v. Omark Indus.*, 114 Idaho 10, 752 P.2d 612 (1988); *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988); *Cawley v. Idaho Nuclear Corp.*, 117 Idaho 34, 784 P.2d 890 (1989); *Riggs v. Estate of Standlee*, 127 Idaho 427, 901 P.2d 1328 (1995); *Sadiku v. Aatronics Inc.*, — Idaho —, 128 P.3d 947 (2006).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

"As soon as practicable."

Claim, filing of.

Construction.

Date of accident.

Death.

—Time for filing claim.

Notice.

Separate claims.

Statute of limitations.

Surety bound by notice to employer.



Time for making claim.  
Waiver.

**"As Soon as Practicable."**

"As soon as practicable" had to be reasonable taking into consideration all of the circumstances of the particular case, and there was nothing in the law to justify a delay of 39 days in giving notice. That the employer was ignorant of the law, even under a liberal construction, was not a good excuse. *Frost v. Idaho Gold Dredging Co.*, 54 Idaho 312, 31 P.2d 270 (1934).

"As soon as practicable" should have been given a liberal construction so as not to defeat, without just cause, the compensation to which a meritorious claimant was entitled. Injury developed gradually and its seriousness and nature were unknown for some weeks. Notice was given 51 days after accident. *Woodbury v. Frank B. Arata Fruit Co.*, 64 Idaho 227, 130 P.2d 870 (1942).

Where an employee asserted that he had received a personal injury caused by an accident arising out of and in the course of his employment and sought compensation for the injury, he should have given notice of the accident to his employer as soon as practicable within not later than sixty days after the happening thereof. *Ansbaugh v. Potlatch Forests, Inc.*, 80 Idaho 515, 334 P.2d 442 (1959).

**Claim, Filing of.**

Compensation claimant, who had never served notice of deceased employee's injury, nor claim for compensation, could not recover from employer, irrespective of whether the statute prescribing the time limit for filing claim was mandatory, or whether it could be waived by failure to plead it. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

Compensation could not be recovered where the claim was not filed within the time required by law. *In re Pahlke*, 56 Idaho 338, 53 P.2d 1177 (1936).

Payment of compensation made voluntarily by the employer, the making and filing claim therefor was not required, and the burden in these circumstances rested upon the state to prove the deceased employee left no dependents. *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939).

Where the industrial accident board made an award based upon the recommendation of the medical adviser to the manager of the state insurance fund, and compensation was paid thereunder without dissent or complaint, the board under these circumstances had jurisdiction to make an order, and where the employee knew of the nature of the order under which he received compensation, such order was not subject to an assailment on any ground of irregularity after a lapse of 20 years. *McGarrigle v. Grangeville Elec. Light*

*& Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939).

Compensation for the loss of a leg or other member may have been recovered after his death, even though no award was made prior to the death, since the award did not fix the right to, only determine, the amount of compensation for the injury; the right to compensation was fixed by the statute, the amount was merely an administrative detail. *Thacker v. Jerome Co-op. Creamery*, 61 Idaho 726, 106 P.2d 863 (1940).

Settlement with estate of deceased of claim filed by deceased which stated that it was not concerned with liability for death was not an admission that death claim had been filed where none in fact had been filed. *Judd v. Rinelli*, 75 Idaho 121, 268 P.2d 671 (1954).

Industrial accident board had jurisdiction of workmen's compensation proceeding brought by employer and its surety for award to injured minor workman where employee had filed no claim and, though not formally shown in the records, there was an action pending in the United States district court involving same parties and same state of facts. *Lockard v. St. Maries Lumber Co.*, 75 Idaho 497, 274 P.2d 995 (1954).

The state insurance fund was an independent agency and was not an arm of the industrial accident board and had the status of a private insurance company. Therefore the filing of a claim with the state insurance fund was not the equivalent of and did not meet the requirement of the filing of a claim with the industrial accident board. *Atwood v. State, Dep't of Agric.*, 80 Idaho 349, 330 P.2d 325 (1958).

**Construction.**

Statutes with respect to notice of injury and claim for compensation, and sufficiency thereof were construed together. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

Statutes relating notice of injury and claim for compensation and insurance contract were construed together. *Moody v. State Hwy. Dep't*, 56 Idaho 21, 48 P.2d 1108 (1935).

Statutes relating notice of injury and claim for compensation and death benefits were construed together. *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939).

The provision for notice to be given to the employer by and on behalf of an injured employee should be broadly and liberally construed to effectuate the main purpose of all of such acts. *Long v. Brown*, 64 Idaho 39, 128 P.2d 754 (1942).

Statute relating notice of injury and claim for compensation was merely a statute of

limitation, and may be waived. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

#### **Date of Accident.**

The statute prescribed the time within which claims for compensation had to be made and served, and this time commenced to run from the date of the accident instead of the first manifestation of a compensable injury. *Moody v. State Hwy. Dep't*, 56 Idaho 21, 48 P.2d 1108 (1935).

The accident sustained by lode mining employee who contracted silicosis was completed when the disease became so bad the employee was forced to cease working, and the one-year period within which claim for compensation had to be filed began to run from such date. *Brown v. St. Joseph Lead Co.*, 60 Idaho 49, 87 P.2d 1000 (1939).

Where it appeared from the evidence that the date of the accumulation accident from silicosis could reasonably be considered to have definitely and ultimately occurred at the time the deceased employee ceased to work, it was sufficient as the fixing of the date of the accident. *Nixon v. St. Joseph Lead Co.*, 60 Idaho 64, 87 P.2d 1007 (1938).

#### **Death.**

##### **—Time for Filing Claim.**

A claim filed within one year after the death of an employee was timely, even though it was more than a year after the accident. *Nixon v. St. Joseph Lead Co.*, 60 Idaho 64, 87 P.2d 1007 (1938).

A dependent of a deceased employee had one year after the employee's death in which to file a claim, even though the employee had filed no claim within his lifetime. *Nixon v. St. Joseph Lead Co.*, 60 Idaho 64, 87 P.2d 1007 (1938).

In case no claim for compensation was made by a dependent of a deceased employee and filed with the industrial accident board within a year after the death, or in case a claim was made and filed within such year and no dependency was proven, it was then proper to make an order requiring the employer to pay \$1000 into the state treasury. *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939).

Where a dependent father and the employer, after they had been informed that the workmen's compensation insurance policy had been canceled by the state insurance fund, and with full knowledge of the facts bearing on the question of dependency, agreed on the amount which was to be paid for funeral expenses and compensation by the employer to the dependent father, and it appearing that they acted in good faith, and that the amount agreed upon was thereafter paid, the failure to file a claim with such board did not render the employer liable to pay \$1000

into the state treasury. *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939).

If dependents failed to file death claim within one year following death the death claim was barred even though claim filed by deceased was pending on the date of his death. *Judd v. Rinelli*, 75 Idaho 121, 268 P.2d 671 (1954).

Appellants had the duty of filing their claim for compensation as dependents with industrial accident board within one year after the death of the employee and the correspondence relied upon to show either a filing of a claim with the state insurance fund or a waiver of the one-year limitation was not sufficient. *Atwood v. State, Dep't of Agric.*, 80 Idaho 349, 330 P.2d 325 (1958).

#### **Notice.**

Claimant, failing to show that his employer, its agents, or representatives had knowledge of accident or had not been prejudiced by delay or want of notice, could not recover compensation. *Wilson v. Standard Oil Co.*, 47 Idaho 208, 273 P. 758 (1929).

In a case of hernia, the knowledge of employer had to be within 30 days. *Page v. State Ins. Fund*, 53 Idaho 177, 22 P.2d 681 (1933).

An application for hearing, if it be the notice required herein, filed more than 60 days after accident, was too late. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781 (1934).

Where a claimant for compensation for a hernia informed her employer's manager immediately upon receiving injuries that she had hurt her side and gave him all of her available information with respect to injuries, the hernia was reported within 30 days so as to authorize an award of compensation. *Hancock v. Troy-Parisian Co.*, 60 Idaho 576, 94 P.2d 674 (1939).

The requirement that notice of an accident be given to the employer was to give him timely opportunity to make an investigation of the accident and surrounding circumstances to avoid payment of an unjust claim. *Long v. Brown*, 64 Idaho 39, 128 P.2d 754 (1942).

A notice given by way of respondent's claim for health benefits under group insurance wherein he claimed occupational disability "due to extra work" without actually reporting any accident specifically avoiding any theory of accident further by crossing that word from the group insurance form and stating the words "extra work" was not sufficient to apprise appellant employer of any accident arising out of and in the course of employment causing personal injury. *Ansbaugh v. Potlatch Forests, Inc.*, 80 Idaho 515, 334 P.2d 442 (1959).

The defense of the statutory employer that claimant failed to state a claim upon which



relief could be granted, particularly claiming employer did not have timely notice in that notice was not given for 85 days of the accident and that the employer was not afforded the opportunity to provide claimant with reasonable medical and kindred services was substantiated by the evidence establishing resultant prejudice to employer. *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

If employer wished to contest the timeliness of the notice, he had to bear the burden of showing that it was not given "as soon as practicable." *Garren v. J. R. Simplot Co.*, 93 Idaho 458, 463 P.2d 558 (1969).

### **Separate Claims.**

Claim for personal injuries by employee and claim for death of employee were separate claims. *Judd v. Rinelli*, 75 Idaho 121, 268 P.2d 671 (1954).

### **Statute of Limitations.**

Since injury and accident are not to be construed as synonymous and the statute required claim to be filed within one year after accident, a claim filed within one year after compensable injury manifested itself but not within a year after the accident was too late. *Moody v. State Hwy. Dep't*, 56 Idaho 21, 48 P.2d 1108 (1935); *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

The running of the statute of limitations did not deprive the tribunal of jurisdiction; it merely barred relief. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

Statute of limitations relative to giving of notice and making claims did not apply to proceeding to recover compensation from second injury fund, since payments were not made from second injury fund until after employer had completed payment of compensation. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

Correspondence consisting of five letters, communications between the state insurance fund and the attorney for the appellants could not be considered as equivalent to the filing of the claim for benefits inasmuch as such correspondence did not show any facts upon which could be predicated a claim of waiver of the requirement that the dependency claim had to be filed with the industrial accident board within one year after the death of the employee; nor any facts sufficient to bar respondents by way of estoppel from asserting the statute of limitations. *Atwood v. State, Dep't of Agric.*, 80 Idaho 349, 330 P.2d 325 (1958).

Conflicting evidence as to the date the disabling accident occurred, with the earlier date in evidence being more than a year prior to the filing of the claim, was sufficient to sus-

tain the board's finding that the claim was barred. *Gregg v. Orr*, 92 Idaho 30, 436 P.2d 245 (1967).

Where the employer's shop foreman was with claimant at the time of the accident and reported such accident directly to the employer and another employee prepared the notice and claim for compensation about six weeks later, claimant gave sufficient and proper notice to his employer of his accident and injury. *Facer v. E.R. Steed Equip. Co.*, 95 Idaho 608, 514 P.2d 841 (1973).

### **Surety Bound by Notice to Employer.**

Where policy provided that insurance company should be bound by and subject to orders, findings and awards rendered against assured, there was no necessity of notice to company of proceedings before accident board. *Hauter v. Coeur d'Alene Antimony Mining Co.*, 39 Idaho 621, 228 P. 259 (1923).

The requirement with respect to the filing and service of claim of accident was the same with respect to the insurance carrier of employee. *Moody v. State Hwy. Dep't*, 56 Idaho 21, 48 P.2d 1108 (1935).

Notice to the employer of an employee's injury or death was notice to the employer's surety. *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

### **Time for Making Claim.**

The time within which claims for compensation had to be made and served, was a personal privilege which the law gave to the debtor, and it had to be pleaded or interposed to be taken advantage of and if not raised, would be deemed abandoned. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

Board did not err in dismissing claims not filed within one-year period on ground that no evidence was introduced on payment of compensation, if claimant did not allege payment of compensation, or contend same at hearing. *Dunn v. Silver Dollar Mining Co.*, 71 Idaho 398, 233 P.2d 411 (1951).

### **Waiver.**

An employer and insurance carrier "waived" the question of timely notice of an employee's injury by failing to raise such question before the industrial accident be given to the employer was to not be raised for the first time on appeal. *Paull v. Preston Theatres Corp.*, 63 Idaho 594, 124 P.2d 562 (1942).

In workmen's compensation proceedings, state insurance fund's withdrawal of its answer and denials, and its admission of claimant's allegations, that death arose out of and in the course of the employment, amounted to a waiver of the requirement of the statute relating to notice of injury and claim for compensation. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am, Jur. 2d, Workers' Compensation, § 489, et seq.

**C.J.S.** — 100 C.J.S., Workers' Compensation, § 837 et seq.

**A.L.R.** — When limitations period begins to run as to claim for disability benefits for contracting of disease under Workers' Compensation or Occupational Diseases Act. 86 A.L.R.5th 295.

When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease. 100 A.L.R.5th 567.

Insurer's waiver of defense of statute of limitations. 104 A.L.R.5th 331.

**72-702. Form of notice and claim.** — Such notice and such claim shall be in writing; the notice shall contain the name and address of the employee, and shall state in ordinary language the time, place, nature and cause of the injury or disease and shall be signed by him or by a person on his behalf, or, in the event of his death, by any one or more of his dependents, or by a person on their behalf. The notice may include the claim. [I.C., § 72-702, as added by 1971, ch. 124, § 3, p. 422.]

## JUDICIAL DECISIONS

## ANALYSIS

Actual knowledge.

Oral notice.

Service of notice.

**Actual Knowledge.**

Plaintiff failed to produce any evidence that she told anyone about the accident so that her employer had actual knowledge of her injuries despite lack of written notice. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998).

**Oral Notice.**

Worker's compensation claimant's vague statement to her supervisor "I was having problems with my back" was ambiguous and insufficient to give the required notice of an accident and injury under § 72-701 and this

section, particularly in view of her prior history of back problems. *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995).

**Service of Notice.**

As required by § 72-701, "notice" is to be given to the employer and there is no additional requirement that notice be given to the surety. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

**Cited in:** *Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977); *Blackwell v. Omark Indus.*, 114 Idaho 10, 752 P.2d 612 (1988).

## DECISIONS UNDER PRIOR LAW

**Sufficiency of Notice or Claim.**

The notice of an accident may also have embraced a claim for compensation, or such notice may have been filed and then followed by a claim, the filing of which may have been at a later date. *McGarrigle v. Grangeville Elec. Light & Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939).

Report of accident and claim for compensation did not have to set forth the facts with the exactitude of a pleading in a civil action. In re

*Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

Where the employer's shop foreman was with claimant at the time of the accident and reported such accident directly to the employer and another employee prepared the notice and claim for compensation about six weeks later, claimant gave sufficient and proper notice to his employer of his accident and injury. *Facer v. E.R. Steed Equip. Co.*, 95 Idaho 608, 514 P.2d 841 (1973).

**72-703. Giving of notice and making of claim.** — Any notice under this law shall be given to the employer, or, if the employer is a partnership,



then to any one (1) of the partners. If the employer is a corporation, then the notice may be given to any agent of the corporation upon whom process may be served, or to any officer of the corporation, or any agent in charge of the business at the place where the injury occurred. Such notice shall be given by delivering it or by sending it by registered or certified mail addressed to the employer at his or its last known residence or place of business. The foregoing provisions shall apply to the making of a claim. [I.C., § 72-703, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Claim, notice thereof.  
Service on subcontractor.

#### **Claim, Notice Thereof.**

The defense of the statutory employer that claimant failed to state a claim upon which relief could be granted, particularly claiming employer did not have timely notice in that notice was not given for 85 days of the accident and that the employer was not afforded the opportunity to provide claimant with reasonable medical and kindred services was substantiated by the evidence establishing resultant prejudice to employer. Findley v.

Flanigan, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, Christensen v. Calico Constr. & Dev. Co., 97 Idaho 327, 543 P.2d 1167 (1975).

#### **Service on Subcontractor.**

The dependents of a deceased employee of a subcontractor may have made a claim upon the employer without serving notice upon the subcontractor. Hiebert v. Howell, 59 Idaho 591, 85 P.2d 699 (1938).

**72-704. Sufficiency of notice — Knowledge of employer.** — A notice given under the provisions of section 72-701 or section 72-448, Idaho Code, shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, nature or cause of the injury, or disease, or otherwise, unless it is shown by the employer that he was in fact prejudiced thereby. Want of notice or delay in giving notice shall not be a bar to proceedings under this law if it is shown that the employer, his agent or representative had knowledge of the injury or occupational disease or that the employer has not been prejudiced by such delay or want of notice. [I.C., § 72-704, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 20, p. 572.]

### STATUTORY NOTES

**Cross References.** — Presumption of sufficient notice where employee is killed or physically or mentally unable to testify, § 72-228.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

## ANALYSIS

Construction.  
Delayed notice.  
Knowledge as notice.  
Lack of prejudice.  
Notice to surety.  
Oral notice.  
Policy.  
Prejudice of employers rights.  
—Burden of proof.  
—Shown.  
Untimely notice.

**Construction.**

The worker's compensation statutes contain no provision, such as this section which preserves claims despite untimely notice of the accident to the employer in certain circumstances, that excuses the late filing of a claim. *Williamson v. Whitman Corporation/Pet*, 130 Idaho 602, 944 P.2d 1365 (1997).

**Delayed Notice.**

Where claimant sought to justify 266 days between the date of the alleged accident and the filing of notice of injury by claiming that there would have been no change in either the surety's investigation or in the medical treatment claimant received had timely notice been given, claimant failed to discharge his obligation of proving that employer and surety either had knowledge of the accident or were not prejudiced by the failure to give prompt notice. *Kennedy v. Evergreen Logging Co.*, 97 Idaho 270, 543 P.2d 495 (1975).

Where employee filed worker's compensation claim seven months after the accident and injury, the employer did not have an opportunity to investigate the alleged accident and injury or to have the employee examined; consequently, the employer was prejudiced by the delay of notice and claimant failed to satisfy her burden of proof to show employer was not prejudiced. *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995).

**Knowledge as Notice.**

Where employer through its personnel manager had actual knowledge of the accident causing employee's injury a short time after its occurrence, employer could not contend that employee's claim was barred for lack of timely notice. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

Idaho industrial commission erred in concluding that the claimant's request for workers' compensation benefits was barred by her failure to give proper notice to her employer under §§ 72-701 through 72-703; under § 72-704, the employer had actual knowledge of

the injury. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005).

**Lack of Prejudice.**

Where employer had fully investigated the accident which caused employee's injury, employer was not prejudiced or rendered less capable of resisting employee's claim by the lack of proper notice of employee's injury. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

**Notice to Surety.**

As required by § 72-701, "notice" is to be given to the employer and there is no additional requirement that notice be given to the surety. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

**Oral Notice.**

Oral notice to the employer may provide the employer with actual knowledge of an injury, thus obviating the necessity of a written notice, and if an employer has considerable knowledge of an accident or injury without having received a formal written notice, no formal notice is required. *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995).

**Policy.**

The policy reason behind this section is to notify the employer of potential claims but at the same time preserve claims despite lack of notice where the employer had actual knowledge or is not prejudiced by lack of notice. That policy is inapplicable to the requirement that a claim be filed with the Industrial Commission within a certain time after the accident. *Petry v. Spaulding Drywall*, 117 Idaho 382, 788 P.2d 197 (1990).

**Prejudice of Employers Rights.****—Burden of Proof.**

In an action for worker's compensation, the burden of proof is on a claimant who has not given notice of the accident to show that no prejudice resulted to the employer on account



of such want of giving notice. *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995).

—**Shown.**

There was sufficient evidence in the record to support the commission's finding that employer was prejudiced by the delay in notice of plaintiff's injuries; had plaintiff seen the employer's doctor after the injuries employer would have been in a better position to determine whether claim for compensation was valid and would have had a chance to question witnesses to determine the validity of plaintiff's claims. *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998).

**Untimely Notice.**

The commission's finding that claimant failed to give timely notice of his accident to

the employer was correct, where the record indicated that the employer did not learn that claimant was claiming a work-related accident until some time after June 7, approximately four months after the date of the accident, and where prior to that time claimant had not filed an accident report with his employer, even though his position as warehouse foreman required him to participate in and become familiar with the plant's safety program, including its policy of reporting every accident regardless of how minor it might be. *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979).

**Cited in:** *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979); *Blackwell v. Omak Indus.*, 114 Idaho 10, 752 P.2d 612 (1988).

DECISIONS UNDER PRIOR LAW

ANALYSIS

**Autopsy.**

Burden of proof.

Knowledge as notice.

Prejudice of employer's rights.

Statement of claim, notice.

Sufficiency of notice.

**Autopsy.**

Failure to notify employer of holding of autopsy was not prejudicial. In *re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

**Burden of Proof.**

Claimant not giving notice had burden of showing that employer, agent, or representative had knowledge of accident, or that no prejudice resulted to employer on account of delay in giving notice. *Bodah v. Coeur d'Alene Mill Co.*, 44 Idaho 680, 258 P. 1079 (1927); *Wilson v. Standard Oil Co.*, 47 Idaho 208, 273 P. 758 (1929).

The burden of showing lack of prejudice because no notice was given was on the employee; and if the notice required by the statute was given as soon as practicable and within 60 days, no excuse was necessary. If not as soon as practicable, though within 60 days, the employee had to show lack of prejudice. *Frost v. Idaho Gold Dredging Co.*, 54 Idaho 312, 31 P.2d 270 (1934).

Where the evidence was conflicting as to whether the disability, lasting beyond a conceded period of three weeks, was the result of an accident or due to "Dupuytren's Contracture," which one doctor testified the employee was suffering from, being a progressive chronic development in men of his age, the board was justified in holding that the employee had not met the burden of proof with respect to nonprejudice, placed on him

by the statute, and he was not entitled to compensation beyond the three week period. *Frost v. Idaho Gold Dredging Co.*, 54 Idaho 312, 31 P.2d 270 (1934).

In proceeding against employer for loss of eye, employee had burden of showing satisfactorily that employer was not prejudiced by delay in giving notice of injury to employer. *Lescinski v. Potlatch Forests, Inc.*, 67 Idaho 98, 170 P.2d 605 (1946).

**Knowledge as Notice.**

Want or delay of written notice was not a bar to compensation, if employer had knowledge of accident or was not prejudiced. *Bodah v. Coeur d'Alene Mill Co.*, 44 Idaho 680, 258 P. 1079 (1927); *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

Knowledge of employer had to be within 60 days. *Cooper v. Independent Transf. & Storage Co.*, 52 Idaho 747, 19 P.2d 1057 (1933). Not mentioned but in effect overruled in *Frost v. Idaho Gold Dredging Co.*, 54 Idaho 312, 31 P.2d 270 (1934).

Lack of statutory notice was no bar on finding of actual notice. *Cooper v. Independent Transf. & Storage Co.*, 52 Idaho 747, 19 P.2d 1057 (1933).

Knowledge, on the part of the employer's agent, of injury to a housemaid within the time that same be reported, and within the time that she was required to give notice, was sufficient notice to employer. *Page v. State Ins. Fund*, 53 Idaho 177, 22 P.2d 681 (1933).

Where an employer possessed the same

knowledge as an employee, the fact that an employee did not report a hernia by designation, when in truth and in fact, it was such, would not warrant a refusal of compensation on that ground. *Page v. State Ins. Fund*, 53 Idaho 177, 22 P.2d 681 (1933).

Where a woman in a hospital was a matron, more or less of a general housekeeper and took care of the nurses and acted as general adviser and mother; had general supervision of the nurses' quarters; hired and discharged the help, subject to the approval of the superintendent; kept the time and had charge of the other maids in the hospital, and had supervision of the housekeeping, a housemaid informing her of an injury, was sufficient notice to the employer. *Page v. State Ins. Fund*, 53 Idaho 177, 22 P.2d 681 (1933).

Where the employer had knowledge through his or its superintendent, the delay in giving the written notice required by law was no bar to the right of compensation. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

The employer had notice, where the employee discussed his injury with the employer's superintendent, as notice to the superintendent was notice to the employer. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

Where it was conclusively shown that the foreman, under and with whom claimant worked, had knowledge of the conditions under which he was employed, the fact that he was breathing rock dust, that he coughed as a result of breathing it, that his cough became worse, that he had a hemorrhage of the lungs, that he gradually grew physically weaker, that he lost weight, did not sleep, had no appetite and that one foreman assisted in making out his claim, this was sufficient to bring the employee within the rule as to the sufficiency of notice. *Beaver v. Morrison-Knudsen Co.*, 55 Idaho 275, 41 P.2d 605 (1934).

Knowledge on the part of the employer within the time provided for giving notice rendered notice unnecessary. *Stoddard v. Mason's Blue Link Stores*, 55 Idaho 609, 45 P.2d 597 (1935).

Where it sufficiently appeared that the employer knew the conditions under which the employee was working and had the same knowledge of the accident that the employee had, that was sufficient to dispense with notice. *Smith v. McHan Hdwe. Co.*, 56 Idaho 43, 48 P.2d 1102 (1935).

Where the employer had actual knowledge that was equal to notice, a failure of the industrial accident board to make a finding that the injury was reported within 30 days after the accident was immaterial. *Smith v. Mercy Hosp.*, 60 Idaho 674, 95 P.2d 580 (1939).

Where a corporate employer's secretary-treasurer was present when an employee died and signed the employer's notice of such employee's death, timely notice thereof was given employer as required by law. *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

Where a representative of the employer was in the cab of a locomotive used in logging operations at the time of injury, another discussed the accident with respondent and later gave him a ticket to the hospital to obtain better treatment than was available at headquarters, employer had timely knowledge of said accident. *Wells v. Potlatch Forests, Inc.*, 67 Idaho 420, 183 P.2d 202 (1947).

Where claimant who injured his back a second time on return to work, told employer that he was going to the doctor as his back was hurting, the employer was not prejudiced by lack of formal notice as he had full knowledge of prior injury. *Harris v. Bechtel Corp.*, 74 Idaho 308, 261 P.2d 818 (1953).

Where the employer's shop foreman was with claimant at the time of the accident and reported such accident directly to the employer and another employee prepared the notice and claim for compensation about six weeks later, claimant gave sufficient and proper notice to his employer of his accident and injury. *Facer v. E.R. Steed Equip. Co.*, 95 Idaho 608, 514 P.2d 841 (1973).

### **Prejudice of Employer's Rights.**

Claim was barred only to the extent the employer was prejudiced by lack of notice. *Frost v. Idaho Gold Dredging Co.*, 54 Idaho 312, 31 P.2d 270 (1934).

Even though employer was in fact prejudiced by reason of lack of knowledge of employee's injury, he was not prejudiced as a matter of law if he had knowledge of the accident, though no injury was apparent at the time. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

Where a physician employed by the employer examined an injured workman, but declined to treat him or examine him further upon the ground that the injury was the result of a previous disease rather than an accident, the employer was not prejudiced, in these circumstances by the failure of the employee to give further notice of the accident, and the employer may not have complained thereof, it affirmatively appearing that the employer was not injured by the delay of notice of the accident, even though it was conceded the notice to the physician was not notice to the employer under the statute, although there was authority to the contrary. *Arneson v. Robinson*, 59 Idaho 223, 82 P.2d 249 (1938).

Where no formal notice was given within the statutory time, and the employer had no knowledge of the accident, but there has been



no prejudice by the delay, there was an award for compensation. *Clayton v. Hercules Mining Co.*, 64 Idaho 34, 127 P.2d 762 (1942).

An employer with sufficient warning and opportunity to investigate was not prejudiced. *Clayton v. Hercules Mining Co.*, 64 Idaho 34, 127 P.2d 762 (1942).

The word "prejudice" in the provision of the act that delay in giving notice of accident to the employer would not bar a compensation proceeding in the absence of prejudice to the employer meant that the employer, by failure to receive notice, had been made less able to resist the claim. *Long v. Brown*, 64 Idaho 39, 128 P.2d 754 (1942).

Evidence warranted award of compensation as a matter of law on the ground that the failure to give timely notice of injury did not "prejudice" the employer, in that he was not made less able to resist the claim by failure to receive notice, inasmuch as he would have made no investigation if such notice had been given but would have merely reported the accident to the insurance company, who did have timely notice of the accident and ample opportunity to make a full investigation. *Long v. Brown*, 64 Idaho 39, 128 P.2d 754 (1942).

Where employer was not notified of injury until more than 60 days after accident, the failure to so notify employer did not prejudice employer's rights since it was shown that it would have been impossible to render medical or surgical aid to relieve the situation. *Moser v. Utah Oil Ref. Co.*, 66 Idaho 710, 168 P.2d 591 (1946).

Evidence sustained finding delay in giving notice of injury to employer was prejudicial to employer's interests and deprived employer of opportunity to make timely investigation and furnish hospitalization, precluding recovery. *Lescinski v. Potlatch Forests, Inc.*, 67 Idaho 98, 170 P.2d 605 (1946).

The burden of proof was on a claimant who had not given, or who had delayed giving notice of the accident, to show that no prejudice resulted to the employer on account of such want of, or delay in, giving notice and that claimant's failure to discharge such burden of proof as showing employer was not prejudiced by the failure to give notice or that they had knowledge of the accident would be a complete bar to an award of compensation. *Ansbaugh v. Potlatch Forests, Inc.*, 80 Idaho 515, 334 P.2d 442 (1959).

The industrial accident board found, after finding that claimant failed to give any written notice to respondent company until 85 days after the accident and that the company had no knowledge of the industrial accident involving the claimant, that the respondent was prejudiced by such delay, claimant hav-

ing undergone surgery in such time, and such delay served as a complete bar. *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

An employer was not prejudiced by delay in receiving notice of a second injury to the claimant in a different employment where the board's apportionment of compensation and medical expense liability to such employer was confined to the period subsequent to such notice. *Dawson v. Hartwick*, 91 Idaho 561, 428 P.2d 480 (1967).

Statutes relating to sufficiency of notice applied to the provision regarding hernia and it was error to dismiss a claimant's claim without granting the claimant's request that the board hear evidence that the employer was not prejudiced by a two-day lateness in reporting claimant's hernia to the employer. *Christensen v. West*, 92 Idaho 87, 437 P.2d 359 (1968).

Even if employer assumed the burden of proof that notice was not given "as soon as practicable," the claimant may still have recovered, provided he showed by a preponderance of the evidence that employer had not been prejudiced by such delay or had actual knowledge. *Garren v. J. R. Simplot Co.*, 93 Idaho 458, 463 P.2d 558 (1969).

#### **Statement of Claim, Notice.**

The defense of the statutory employer that claimant failed to state a claim upon which relief could be granted, particularly claiming employer did not have timely notice in that notice was not given for 85 days of the accident and that the employer was not afforded the opportunity to provide claimant with reasonable medical and kindred services was substantiated by the evidence establishing resultant prejudice to employer. *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

#### **Sufficiency of Notice.**

Notice had to be sufficient to apprise the employer of any accident arising out of and in the course of the employment causing the personal injury, such requirement being to give the employer timely opportunity to make an investigation of the accident and surrounding circumstances and avoid the payment of an unjust claim. *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

**72-705. Limitation of time — Minors and incompetents.** — No limitation of time provided in this law shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend. [I.C., § 72-705, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Minors.

Time of incompetency.

#### **Minors.**

If a mother should neglect to make application for compensation or should allow the statute of limitations to run against her claim, her minor children would still have a right to petition for compensation. *Hiebert v. Howell*, 59 Idaho 591, 85 P.2d 699 (1938). See § 72-406.

claimant became mentally incompetent, with some evidence that it did not occur until more than a year after the accident upon which his claim was based, finding of the board that the statute of limitation was not tolled by such incompetency was sustained by the evidence. *Gregg v. Orr*, 92 Idaho 30, 436 P.2d 245 (1967).

#### **Time of Incompetency.**

With the evidence conflicting as to when the

**72-706. Limitation on time on application for hearing.** — (1) When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless misled to his prejudice by the employer or surety, shall have one (1) year from the date of making claim within which to make and file with the commission an application requesting a hearing and an award under such claim.

(2) When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.

(3) When income benefits discontinued. If income benefits have been paid and discontinued more than four (4) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease, the claimant shall have one (1) year from the date of the last payment of income benefits within which to make and file with the commission an application requesting a hearing for additional income benefits.



(4) Medical benefits. The payment of medical benefits beyond five (5) years from the date of the accident causing the injury or the date of first manifestation of an occupational disease shall not extend the time for filing a claim or an application requesting a hearing for additional income benefits as provided in this section.

(5) Right to medical benefits not affected. Except under circumstances provided in subsection (1) of this section, the claimant's right to medical benefits under the provisions of section 72-432(1), Idaho Code, shall not be otherwise barred by this section.

(6) Relief barred. In the event an application is not made and filed as in this section provided, relief on any such claim shall be forever barred. [I.C., § 72-706, as added by 1971, ch. 124, § 3, p. 422; am. 1978, ch. 264, § 21, p. 572; am. 1989, ch. 244, § 1, p. 592; am. 1991, ch. 206, § 1, p. 487; am. 2005, ch. 161, § 2, p. 493.]

## JUDICIAL DECISIONS

### ANALYSIS

Application.

Application for hearing.

Claim not barred.

"Compensation".

Construction.

Construction with other law.

Final award.

Limitation of action.

—Dismissal with prejudice.

—Tolling.

Payment after limitation period.

Payment of claim by wrong employer.

"Payments of compensation".

Retention of jurisdiction.

Retraining program.

Time for paying benefits.

When compensation discontinued.

### Application.

This section's statute of limitations does not apply to the time for filing claims for disability, but rather applies to the time for filing applications for hearings before the industrial commission. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

Where a previous compensation agreement had been entered into between the claimant and the employer, the claimant's action seeking benefits for total and permanent disability was not brought pursuant to § 72-719, where the compensation agreement simply reaffirmed that previous payments had been made, and the payments were made voluntarily by the employer thereby bringing the case within the application of subsection (2) of this section. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

Subsection (2) of this section may apply if a

compensation agreement was not intended to provide compensation to claimant for permanent disability. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

For this section to apply, claimant need not have filed a claim prior to the payment of the compensation. *Williamson v. Whitman Corporation/Pet*, 130 Idaho 602, 944 P.2d 1365 (1997).

Employee's written claim for benefits was a "claim" for the purposes of § 72-706(1); while the claim was filed prior to the employee's visits to a new physician, the surety became aware of the new physician's involvement through correspondence prior to the hearing, and this knowledge, combined with the claim, gave the employer and surety time to pay for the treatment, and thus the employee effectively petitioned the Idaho industrial commis-

sion for a change of physician pursuant to § 72-432(4). *Seward v. Pac. Hide & Fur Depot*, 138 Idaho 509, 65 P.3d 531 (2003).

#### **Application for Hearing.**

If, at the expiration of the one-year limitation period on a claim for compensation, the matter is already set for hearing on the merits, the claimant is not required to file an application for hearing. *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977).

#### **Claim Not Barred.**

Where the first manifestation of dermatitis resulting from contact with wet cement dated from November, 1972 at the earliest and a claim for additional compensation was filed in November, 1974, the claim would not be barred under subsection (2). *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

There was substantial competent evidence to support the industrial commission's finding that prior to the expiration of the five-year time period for filing an application for a workers' compensation hearing, the claimant and the employer, as well as the claimant and the employer's heirs, became engaged in consultations and negotiations concerning a claim, that these negotiations may have possibly lead claimant to believe that no decision had been made by employer and that it was not necessary to file an application for hearing, and that claimant's claim was not time barred. *Swenson v. Estate of Craner*, 117 Idaho 57, 785 P.2d 621 (1990).

Where a claimant's attorney sent a letter to the employer's insurance carrier referencing the claimant's accident and claim, this constituted proper notice of the claim to the employer, so a complaint filed within one year of the notice was timely filed under this section. *Tonahill v. Legrand Johnson Constr. Co.*, 131 Idaho 737, 963 P.2d 1174 (1998).

#### **"Compensation".**

As referred to in subsection (2), "compensation" has been defined as either income or medical benefits. *Fowler v. City of Rexburg*, 116 Idaho 609, 773 P.2d 269 (1988).

Because medical benefits are included in the definition of compensation under § 72-102, the payment of medical benefits under § 72-432 must be taken into account under subsection (2) of this section to determine whether compensation was being paid when the limitation period provided in subsection (2) of this section expired. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

#### **Construction.**

The five-year limitation period, running from the first manifestation of an occupational disease, which is established by subsection

(2), conflicts with and prevails over the one-year period, running from the last payment of compensation, established under subsection (3). *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

#### **Construction with other law.**

In a situation where compensation abruptly ceases, this section, not section 72-701, is triggered. *Williamson v. Whitman Corporation/Pet*, 130 Idaho 602, 944 P.2d 1365 (1997).

#### **Final Award.**

This section does not apply where there has been a final award entered by the industrial commission. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

A compensation agreement between a workmen's compensation claimant and the state insurance fund which clearly provided for an award of disability, and which was approved by the industrial commission, became an "award" which, under §§ 72-711 and 72-718 was final and conclusive as to claimant's disability and this section had no application to it. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

Where a compensation agreement was ambiguous as to whether it determined claimant's disability or only impairment, summary judgment based on the statute of limitations on claimant's subsequent application for modification was precluded; if the agreement only determined impairment, then the award therein was not final as to disability, and this section would have been the applicable statute of limitations. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

#### **Limitation of Action.**

##### **—Dismissal With Prejudice.**

Payment of a claimant's initial medical bills by the employer's surety affects the question of which limitation period applies under this section. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P.2d 3 (1977).

Although industrial accident occurred in 1975, the industrial commission correctly applied the revised version of subsection (2) of this section, because the 1978 statute was enacted before the claimant's five year period under the old statute had run. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

Subdivision (2) of this section allows a claimant to apply for hearing against an employer within five years from the date of the accident causing the injury or the date of first manifestation of an occupational disease. A dismissal with prejudice prior to the expiration of the five-year period when a claimant sought a dismissal without prejudice would be inconsistent with the claimant's right to apply for a hearing within five years; this would violate the authority given to the Commission in § 72-508 to adopt judicial rules



"not inconsistent with law." *Burton v. State, Indus. Indem. Fund*, 125 Idaho 830, 875 P.2d 927 (1994).

#### —Tolling.

Paying of medical benefits to a workmen's compensation claimant tolled the one-year statute of limitations for filing an application for additional benefits. *Ryen v. City of Coeur d'Alene*, 115 Idaho 791, 770 P.2d 800 (1989).

There was substantial and competent evidence to support the industrial commission's determination that the claimant failed to meet the requirements of subsection (1) by failing to file a request for hearing within one year of the date of making her claim for benefits. *Ewing v. Holton*, 135 Idaho 792, 25 P.3d 105 (2001).

#### Payment after Limitation Period.

With regard to whether an employee is entitled to compensation in the form of medical benefits after the expiration of the limitation period in subsection (2) of this section, the more specific provisions of § 72-432(1) control over subsection (2) of this section. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

#### Payment of Claim by Wrong Employer.

Temporary payment of compensation by the out-of-state surety of claimant's previous employer, under the mistaken belief that claimant was still working for the previous employer, did not toll the time limitation on claimant's application for a hearing, where neither the subsequent employer nor his surety received notice of claimant's accident or injury within the statutory time. *Kennedy v. Evergreen Logging Co.*, 97 Idaho 270, 543 P.2d 495 (1975).

#### "Payments of Compensation".

"Compensation" is a word of art under the Workmen's Compensation Act and refers to income and medical benefits made under the provisions of the Act. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

The medical and insurance benefits paid under group policies provided by the employer were not "payments of compensation" within the meaning of subsection (2) of this section; therefore, the statute of limitations was not extended. *Bainbridge v. Boise Cascade Plywood Mill*, 111 Idaho 79, 721 P.2d 179 (1986).

#### Retention of Jurisdiction.

Income benefits are time barred by subsection (2) of this section unless the industrial commission has retained jurisdiction of the claim; thus, where the Commission closed the file on the claimant's case but noted that the closure was subject to determination of the permanent disability, if any, the Commission

clearly indicated its intent to retain jurisdiction of the claim and the claimant's claim for an award of permanent disability was not barred even though it was not filed within five years of the date of the accident. *Horton v. Garrett Freightlines*, 106 Idaho 895, 684 P.2d 297 (1984).

The industrial commission had continuing jurisdiction where the subsequent application requesting total permanent disability was made within the time limits of this section. *Waltman v. Associated Food Stores, Inc.*, 109 Idaho 273, 707 P.2d 384 (1985).

#### Retraining Program.

Although, in determining the date of the last payment of compensation under this section, the retraining program was not proffered pursuant to the procedure outlined in § 72-450, it was nevertheless a worker's compensation benefit. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

#### Time for Paying Benefits.

As to when medical benefits must be paid, § 72-432(1) takes precedence over subsection (2) of this section, which deals generally with all matters of compensation. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

Industrial commission did not err in denying an employee's claim for more benefits as the point of the statute was to allow hurt workers to have time to file for income compensation once some sense of their medical condition was known as well as to allow employers freedom from further liability; if workers could claim that benefits received after the fourth anniversary, yet not related to a specific benefits payout spanning the fourth anniversary, reset the one-year window, employers could potentially never be absolved of their responsibilities. *Salas v. J.R. Simplot Co.*, 138 Idaho 212, 61 P.3d 569 (2002).

#### When Compensation Discontinued.

When payment of compensation is discontinued more than five years after the date of the injury, the claimant has one year following the date of the last payment in which to file an application for further compensation and award; accordingly, where the employer discontinued paying total temporary disability benefits five years and six months after the date of the claimant's injury, the claimant had one year from the date of the last payment to apply for further compensation. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984).

The language of subsection (2) of this section, that allows the filing of an application for a hearing within one year of the last payment of compensation "if compensation is discontinued more than five (5) years from the date of the accident causing the injury," nec-

essarily implies that compensation was being paid on the fifth anniversary of the accident and was thereafter discontinued. Consequently, the statute's one-year extension for filing hearing applications does not apply if no compensation was being paid on the fifth

anniversary of a claimant's injury causing accident. *Figueroa v. ASARCO, Inc.*, 126 Idaho 602, 888 P.2d 381 (1994).

**Cited in:** *Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977); *Wright v. Willer*, 111 Idaho 479, 725 P.2d 179 (1986).

## DECISIONS UNDER PRIOR LAW

### \* ANALYSIS

Claims barred.  
Duty of employee.  
Estoppel.  
Evidence.  
Limitation of action.  
Medical expenses as compensation.  
Period for filing.  
Subsequent claims from same accident.

### Claims Barred.

Where claim was filed with board on May 12, 1949, but no petition for hearing was filed until June 6, 1950 claim was barred by the statute. *Dunn v. Silver Dollar Mining Co.*, 71 Idaho 398, 233 P.2d 411 (1951).

Employee who did not file petition for a hearing until over two years after claim was filed was barred from recovering compensation. *Arnold v. Claude Lacey & Son*, 73 Idaho 1, 245 P.2d 398 (1952).

Where widow's claim did not come into existence until death of employee and she had perfected her pending appeal within the time limit specified it was not barred. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957).

Claimant having failed to file his petition for hearing within the time authorized by the statute was barred from presenting his claim. *Shell v. Standard Oil Co.*, 93 Idaho 370, 461 P.2d 265 (1969).

Where claimant received an injury in 1964 for which his employer paid the doctor bills but no claim was filed until 1971, as some compensation was paid and then stopped, the four year time limit of former law providing the time and manner for making claims applied and any claim based on the 1964 accident was barred. *Cummings v. J.R. Simplot Co.*, 95 Idaho 465, 511 P.2d 282 (1973).

### Duty of Employee.

The employee had the duty of filing his claim with the board and filing a petition for a hearing. *Arnold v. Claude Lacey & Son*, 73 Idaho 1, 245 P.2d 398 (1952).

### Estoppel.

Employer and insurer were estopped to plead limitation bar where insurer, following filing of claim, continued investigation of accident, furnished hospital and medical treatment, and by statements to claimant led him to believe that claim was still under consider-

ation. *Harris v. Bechtel Corp.*, 74 Idaho 308, 261 P.2d 818 (1953).

### Evidence.

Where employer asserted that the accident occurred earlier than the limitation period so that employee's action was barred by the statute of limitations, but evidence introduced without objection corroborated by employee's testimony showed the accident to have occurred at a later date so that the petition would not be barred such evidence was sufficient to sustain the industrial accident board's finding that the accident occurred at such later date. *Clevenger v. Potlatch Forests, Inc.*, 82 Idaho 383, 353 P.2d 396 (1960).

### Limitation of Action.

The statutory limitations for filing of claim and filing of petition for a hearing were not extended by provision regarding assessment of a penalty for failure of employer to make accident reports to the board. *Arnold v. Claude Lacey & Son*, 73 Idaho 1, 245 P.2d 398 (1952).

The four-year (now five-year) limitation was held to have been waived where it was shown that though there was no attempt to mislead claimant, claimant had no advice of counsel until the period was about to expire and the fund continued to ask for medical examinations and reports, the expenses of which it authorized and paid, and the furnishing of back supports during this period of time, all of which very well could have led claimant to believe that the employer and the fund had not reached a final decision either as to the end of the healing period or the evaluation of permanent partial disability. *Lindskog v. Rosebud Mines, Inc.*, 84 Idaho 160, 369 P.2d 580 (1962).

It was the claimant's obligation to prove that the statute had been tolled by the payment of compensation. *Shell v. Standard Oil*



Co., 93 Idaho 370, 461 P.2d 265 (1969).

It was possible under certain conditions to waive the statute of limitations on the filing of request for a hearing on a claim by payment of wages and medical bills of a claimant. *Bottoms v. Pioneer Irrigation Dist.*, 95 Idaho 487, 511 P.2d 304 (1973).

#### **Medical Expenses as Compensation.**

As claimant received a payment for medical expenses during the period of time between the date of accident and filing a claim for compensation and as payment of hospital and medical expenses was included within the term "compensation," the payment of compensation to claimant tolled the one year statute of limitations and made the four year statute of limitations applicable. *Facer v. E.R. Steed Equip. Co.*, 95 Idaho 608, 514 P.2d 841 (1973).

#### **Period for Filing.**

Since the language of former law providing the time and manner in which claims for

compensation were to be made was unambiguous in stating that the four year period during which a claim for compensation could be filed should run from the date of the "accident" and not from the date of the "injury" argument of claimant that time for filing claim should not begin to run until first manifestation of compensable injuries was without merit. *Cummings v. J.R. Simplot Co.*, 95 Idaho 465, 511 P.2d 282 (1973).

#### **Subsequent Claims from Same Accident.**

Where claimant filed his claim, which was denied and demanded his hearing and obtained it before the industrial accident board within the time limit, law providing for time within which claim was required to be filed was not applicable to his later claim for additional benefits under the same accident since the time requirement was met by the first filing. *Brooks v. Duncan*, 96 Idaho 579, 532 P.2d 921 (1975).

### **RESEARCH REFERENCES**

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 581 et seq.

**C.J.S.** — 100A C.J.S., Workers' Compensation, § 1071 et seq.

**72-707. Commission has jurisdiction of disputes.** — All questions arising under this law, if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission. [I.C., § 72-707, as added by 1971, ch. 124, § 3, p. 422.]

### **STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### **JUDICIAL DECISIONS**

#### **ANALYSIS**

Class actions.

Jurisdiction.

—District court.

—Exclusiveness.

Legislative intent.

Questions arising under this law.

#### **Class Actions.**

The workmen's compensation law does not specifically mandate that the industrial commission entertain class action proceedings. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

Although the industrial commission has the power to adopt a rule which would permit a class action proceeding before it, it has not chosen to adopt such a rule and this inaction

does not constitute a denial of due process; accordingly, commission's order stating that it did not have authority to entertain class action was affirmed. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

#### **Jurisdiction.**

Where injured worker appellant and spouse appealed the decision of the trial court dismissing their claims against the Idaho De-

partment of Transportation's worker's compensation surety (SIF) for lack of subject matter jurisdiction and dismissing their waiver of subrogation claim against SIF pursuant to § 72-223(3) because of SIF's pending action against the appellant's attorney, the Supreme Court held that appellants presented claims arising under § 72-804 and that under this section the industrial commission had exclusive jurisdiction of all questions arising under the workers' compensation law. *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

Injured worker appellant's claim that employer's workers' compensation surety had waived its subrogation rights arose under § 72-223(3), and, as such, was a question within the exclusive jurisdiction of the industrial commission under this section. *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

The Idaho industrial commission has exclusive jurisdiction of all questions arising under worker's compensation law; however, chiropractor's claim against worker's compensation surety to recover for intentional interference with prospective economic relationship with worker did not arise under, nor require interpretation or application of worker's compensation law; thus, the exclusive jurisdiction of the Commission was not implicated and magistrate court had jurisdiction. *Downey Chiropractic Clinic v. Nampa Restaurant Corp.*, 127 Idaho 283, 900 P.2d 191 (1995).

Since question of whether State Insurance Fund (SIF) was entitled to subrogation pursuant to § 72-223(3) is a question arising under the worker's compensation law which is within the exclusive jurisdiction of the industrial commission district court had no jurisdiction. *Idaho State Ins. Fund ex rel. Forney v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1997).

#### —District Court.

Section 72-319 fits within the "except as otherwise herein provided" language of this section by granting the district court jurisdiction over an action to recover statutory penalties. *State ex rel. Industrial Comm'n v.*

*Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000).

#### —Exclusiveness.

An employee's action against the industrial commission and the Insurance Fund and several of their respective employees alleging that she was injured in an industrial accident and received an inadequate award for those injuries was properly dismissed as district courts are expressly forbidden to exercise any jurisdiction in any cause seeking to in any way interfere with the actions or jurisdiction of the industrial commission. *West v. State*, 112 Idaho 1038, 739 P.2d 337 (1987).

Under the plain words of this section and the court's interpretation of the section, the industrial commission has exclusive jurisdiction over all disputes arising under the worker's compensation law, unless the legislature has otherwise provided. *State ex rel. Industrial Comm'n v. Quick Transp., Inc.*, 134 Idaho 240, 999 P.2d 895 (2000).

#### Legislative Intent.

Since worker's compensation statutes must be considered in the context of the entire act, the court held that it was clear the legislature intended, in order for the worker's compensation law to achieve its purpose of providing sure and certain relief for injured workers and their families, that all claims, issues and civil actions relating in any manner to the injury of a worker be decided under by the industrial commission. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

#### Questions Arising Under This Law.

The question of which of two sureties is responsible for claimant's injury was a "question arising under this law" as provided in this section and was properly determined by the industrial commission. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

**Cited in:** *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 106 P.3d 455 (2005); *Kolar v. Cassia County Idaho*, 127 Idaho 245, 127 P.3d 962 (2005).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Authority of board.  
Investigation.  
Jurisdiction.

#### Authority of Board.

Board had exclusive, general and comprehensive authority to fix rates charged by

hospitals for services rendered patients receiving compensation. In *re Idaho Hosp. Ass'n*, 73 Idaho 320, 251 P.2d 538 (1952).



**Investigation.**

Board had the power to investigate, to examine witnesses, and to call a matter for hearing, however, statute relating to hearings was not mandatory and stated that the board "may" call for a hearing, so that the filing of claim with board and filing of petition for hearing were duties of employee. *Shell v. Standard Oil Co.*, 93 Idaho 370, 461 P.2d 265 (1969).

**Jurisdiction.**

Jurisdiction of exempted employment, could not be acquired by estoppel, agreement, waiver or conduct. *Kindall v. McBirney*, 52 Idaho 65, 11 P.2d 370 (1932).

Although the board was a tribunal of limited scope, it had general and exclusive original jurisdiction in the state field of industrial accidents. *Johnson v. Falen*, 65 Idaho 542, 149 P.2d 228 (1944).

Industrial accident board had jurisdiction

of workmen's compensation proceeding brought by employer and its surety for award to injured minor workman where employee had filed no claim and though not formally shown in the records, there was an action pending in the United States district court involving same parties and same state of facts. *Lockard v. St. Maries Lumber Co.*, 75 Idaho 497, 274 P.2d 995 (1954).

Alleged surety's contention that it had canceled the policy before the accident was not a subject of controversy for the industrial accident board to determine nor one in which the injured workman was in any wise interested, the liability having been paid by the employer prior to the hearing, the liability of the surety being a matter based on contract, determinable only by a court of competent jurisdiction and not by the industrial accident board. *Thompson v. Liberty Nat'l Ins. Co.*, 78 Idaho 381, 304 P.2d 910 (1956).

**72-708. Process and procedure.** — Process and procedure under this law shall be as summary and simple as reasonably may be and as far as possible in accordance with the rules of equity. [I.C., § 72-708, as added by 1971, ch. 124, § 3, p. 422.]

**STATUTORY NOTES**

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

**JUDICIAL DECISIONS****ANALYSIS**

Class actions.

Evidence.

Procedure.

— Improper.

Purpose.

Purpose of proceedings.

**Class Actions.**

The workmen's compensation law does not specifically mandate that the Industrial Commission entertain class action proceedings. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

Although the Industrial Commission has the power to adopt a rule which would permit a class action proceeding before it, it has not chosen to adopt such a rule and this inaction does not constitute a denial of due process; accordingly, commission's order stating that it did not have authority to entertain class action was affirmed. *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983).

**Evidence.**

Once the Industrial Commission places new evidence into the record, all parties should have a right to dispute that evidence by challenging its validity or by introducing additional or conflicting evidence; thus, it was error for the Commission not to allow the Industrial Special Indemnity Fund to dispute the physician's rating of 12% impairment with respect to the claimant's arm. *Mapusaga v. Red Lion Riverside Inn*, 113 Idaho 842, 748 P.2d 1372 (1987), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

The Industrial Commission erred when it

refused to consider the medical treatise offered without proper foundation by pro se claimant; although these errors were most unfortunate they were, in this particular case, harmless. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

Strict adherence to the rules of evidence is not required in Industrial Commission proceedings and admission of evidence in such proceedings is more relaxed. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

#### **Procedure.**

Where the Idaho State Insurance Fund (SIF) appealed from final decisions and orders of the Industrial Commission to pay for approved medical services performed on two claimants' work-related injuries, contending that the commission's dispute resolution system for the approval of medical charges violated constitutional, statutory, and equitable concerns, the Supreme Court of Idaho found that although the SIF did not have a full, formal hearing, it had submitted briefs before the commission and filed an appeal from the commission's decision with the court, thus the dispute resolution system enacted by the commission for the approval of disputed medical charges did provide parties with the opportunity to be heard at a meaningful time and in a meaningful manner. *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 911 P.2d 754 (1996).

#### **—Improper.**

The Supreme Court vacated the Industrial Commission's order and remanded for recon-

sideration because worker should not have been prejudiced by employer's filing of a premature appeal and it was immaterial that the motion to amend was made after the testimony on liability was heard. There is no time limit on such motions in the Industrial Commission's Rules of Judicial Practice and Procedure. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

#### **Purpose.**

To hold that a claimant's application for hearing cannot also be considered a claim for compensation would contravene the purpose of the act which is designed to avoid cumbersome procedures and technicalities of pleading so that, to the greatest extent possible, claims for compensation can be decided on their merits. *Hattenburg v. Blanks*, 98 Idaho 485, 567 P.2d 829 (1977).

#### **Purpose of Proceedings.**

Since the inception of Idaho's Workers' Compensation Act, Industrial Commission proceedings have been informal and designed for simplicity; the primary purpose of these proceedings being the attainment of justice in each individual case. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

**Cited in:** *Kessler ex rel. Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997); *Perkins v. Croman, Inc.*, 134 Idaho 721, 9 P.3d 524 (2000).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Due process.

In general.

Persons entitled to petition.

#### **Due Process.**

In case of direct attack upon an award, no presumptions in favor of jurisdiction or due process could be indulged. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923), overruled on other grounds, *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982).

Hearings before industrial accident board, which had no interest in the controversy, though its employees had made investigations and orders, were not a denial of due process. The board was not in a true sense an adversary. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

#### **In General.**

Rules governing procedure before board should have been flexible and informal so that objects of act might be accomplished in sum-

mary manner, while preserving rights of parties and doing justice between them. *In re Bones*, 48 Idaho 85, 280 P. 223 (1929).

The industrial accident board was a fact-finding, administrative body, and strict rules of procedure were not required to be followed, and it was the duty of that board to conduct its proceedings so as to promote justice and not to pervert the same. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

By the enactment of the Workmen's Compensation Act, the legislature intended to give the injured workman a speedy, summary and simple remedy for the recovery of compensation in all cases coming within its provisions, that strict rules of procedure are not required, and that in every case where compensation is not settled by agreement, the board, or a



member thereof to whom the matter has been assigned, should make such inquiries and investigations as should be deemed proper. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

The act manifested intent to give injured workman a speedy, summary and simple remedy for recovery of compensation, without strict rules of procedure. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

Informal procedure, partly *ex parte*, characterized as irregular and summary, under the peculiar circumstances of the case, was upheld. *McGarrigle v. Grangeville Elec. Light & Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939).

The statute providing that when an instrument was pleaded in an answer the same was deemed admitted, unless plaintiff filed with the clerk within ten days after receiving a copy of the answer, an affidavit denying the same, and served a copy thereof on the defendant, did not apply to proceedings before the industrial accident board. *O'Neil v. Madison Lumber & Mill Co.*, 61 Idaho 546, 105 P.2d 194 (1940).

Rule of liberal construction applied to

board's procedure. *Stroschein v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941).

Hearings before the board, though its employees had made investigations and orders, were not a denial of due process. The board was not in the true sense an adversary. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

Notwithstanding that proceedings under the Workmen's Compensation Law were not governed so strictly by evidentiary and procedural rules as applied in courts of law, the procedure before the board had to be as far as possible in accordance with the rules of equity and making an award to a claimant during a continuance ordered at the close of claimant's evidence, without offering the defendants an opportunity to be heard in defense, was reversible error. *Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 441 P.2d 172 (1968).

#### **Persons Entitled to Petition.**

A voluntary association of designated member and associated hospitals was entitled to file a petition in behalf of its members to review order of board fixing hospital room rates. *In re Idaho Hosp. Ass'n*, 73 Idaho 320, 251 P.2d 538 (1952).

**72-709. Attendance of witnesses — Production of documents — Deposition — Witness fees.** — (1) The commission or any member thereof or any hearing officer, examiner or referee appointed by the commission shall have the power to subpoena witnesses, administer oaths, take testimony, issue subpoenas *duces tecum*, and to examine such of the books and records of the parties to a proceeding as relates to the questions in dispute.

(2) The district court shall have the power to enforce by proper proceedings the attendance and testimony of witnesses, and the production and examination of books, papers and records.

(3) The testimony of any witness for use as evidence in any proceeding may be taken by deposition or interrogatories.

(4) No person shall be required to attend as a witness in any such proceeding unless his lawful mileage and witness fee for one (1) day's attendance shall first be paid or tendered to him. [I.C., § 72-709, as added by 1971, ch. 124, § 3, p. 422.]

### **STATUTORY NOTES**

**Cross References.** — Fees and mileage of witnesses, § 9-1601 et seq.

### **JUDICIAL DECISIONS**

**Cited in:** *Thom v. Callahan*, 97 Idaho 151, 540 P.2d 1330 (1975); *Hagler v. Micron Tech-*

*nology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

## DECISIONS UNDER PRIOR LAW

**Taking Testimony.**

The board may not only examine any competent witness at the conclusion of his direct and cross-examination upon all matters, material and relevant to any issue, but may also subpoena and examine other competent witnesses. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

The board had authority to take testimony without the state on stipulation of the parties. *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

Where witnesses testified by deposition and did not appear before the industrial accident

board to testify and thus give the board an opportunity to hear and see them, the Supreme Court had to examine the evidence and determine its value. *Howard v. Washington Water Power Co.*, 65 Idaho 339, 144 P.2d 210 (1943).

To carry out the provisions of the Workmen's Compensation Act the industrial accident board had the responsibility and authority to examine any competent witnesses and to subpoena and examine other competent witnesses. *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963).

## RESEARCH REFERENCES

**A.L.R.** — Use of medical books or treatises as independent evidence. 17 A.L.R.3d 993.

**72-710. Transcripts of proceedings.** — A stenographic or machine transcription of any proceeding or of testimony adduced at any hearing, shall be taken by the commission. [I.C., § 72-710, as added by 1971, ch. 124, § 3, p. 422.]

**72-711. Compensation agreements.** — If the employer and the afflicted employee reach an agreement in regard to compensation under this law, a memorandum of the agreement shall be filed with the commission, and, if approved by it, thereupon the memorandum shall for all purposes be an award by the commission and be enforceable under the provisions of section 72-735, unless modified as provided in section 72-719. An agreement shall be approved by the commission only when the terms conform to the provisions of this law. [I.C., § 72-711, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Cross References.** — Filing in district court of approved agreement, entry of judgment and enforcement, § 72-735.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

## ANALYSIS

Ambiguous agreement.  
Finality of award.  
Lump sum settlement.  
Matters actually considered.  
Nature of agreement.  
Parties bound by agreement.

**Ambiguous Agreement.**

Where a compensation agreement was ambiguous as to whether it determined claimant's disability or only impairment, summary judgment based on the statute of limitations

on claimant's subsequent application for modification was precluded; if the agreement only determined impairment, then the award therein was not final as to disability, and § 72-706 would have been the applicable stat-



ute of limitations. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

### **Finality of Award.**

Except as provided by § 72-719 an award under the provisions of this section becomes final and conclusive if no appeal is taken. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

### **Lump Sum Settlement.**

A lump sum settlement agreement constitutes a final decision of the Industrial Commission which is subject to a motion for reconsideration or rehearing under the provisions of § 72-718. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986).

### **Matters Actually Considered.**

The legislature, by adding the phrase "as to all matters adjudicated" when they enacted § 72-718 in 1971, intended that decisions of the commission be final and conclusive only as to those matters actually adjudicated; this is a departure from the concept of pure res judicata, applied prior to 1971, which accorded decisions by the commission finality and conclusiveness as to all matters which were, or could have been, adjudicated. Therefore, a compensation agreement approved by the commission was only final and conclusive as to those matters actually considered by the commission. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984).

### **Nature of Agreement.**

A compensation agreement approved by the Industrial Commission is equivalent to an award under the Idaho Workmen's Compensation Laws. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

Where plaintiff employee decided not to pursue his Workers' Compensation Act claim

against defendant employer, and stipulated with the employer for a dismissal with prejudice, approval of the stipulation did not implicate § 72-404 or this section, as there was no lump sum settlement, and a lump sum settlement was not the only way to permanently settle workers' compensation claims. *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005).

### **Parties Bound by Agreement.**

Where the Industrial Commission approved an agreement between the claimant and the employer's surety, to which the Industrial Special Indemnity Fund (I.S.I.F.) was not a party, only the employee and the employer and his surety could rely upon the finality of that award under § 72-718 and this section; thus, the I.S.I.F. could not claim that approval of the compensation agreement foreclosed proceedings against it. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

A compensation agreement between a workmen's compensation claimant and the State Insurance Fund which clearly provided for an award of disability, and which was approved by the Industrial Commission, became an "award" which, under this section and § 72-718 was final and conclusive as to claimant's disability and § 72-706 had no application to it; modifications to the agreement were governed by § 72-719 and the agreement could not be modified because claimant's application for modification was not filed within 5 years of the date of the injury, even though the application was filed within one year of payment of medical benefits. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

**Cited in:** *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

Effective as award.  
Guardian of minor.  
Nature of agreement.

### **Effective as Award.**

Agreement of employer and surety to pay compensation to child, having been approved by board, had same effect as award of such board. *Rodius v. Coeur d'Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

An agreement between the parties as to compensation, which was approved by the industrial accident board, constituted an award of the board, and was res judicata. *Reagan v. Baxter Foundry & Mach. Works*, 53 Idaho 722, 27 P.2d 62 (1933).

An agreement for compensation entered

into by the employee and employer and his insurance carrier, if any, and approved by the industrial accident board, constituted a decision and award of the board and had the same effect as an award by the board. *Department of Finance v. Union Pac. R.R.*, 61 Idaho 484, 104 P.2d 1110 (1940).

### **Guardian of Minor.**

Where guardian and ward were both non-residents of Idaho, and guardian had not complied with statutes authorizing him to remove ward's property from state and giving

guardian authority to receive said property or sue for same in his own name, such guardian could not lawfully enter into contract fixing compensation, and receive thereunder moneys awarded by board, notwithstanding approval of such contract by board. *In re Bones*, 48 Idaho 85, 280 P. 223 (1929).

#### **Nature of Agreement.**

Before the industrial accident board could approve an agreement for compensation, such agreement had to embrace the provisions of the law, or such provisions would be read into the same. *Hanson v. Independent Sch. Dist.* 11-J, 57 Idaho 297, 65 P.2d 733 (1937).

The ambit of power of the industrial accident board was circumscribed by the statutes respecting the award of compensation, and

the board was without authority to award lesser or different compensation than that prescribed by law, and the situation was not changed by virtue of the fact that the employee was suffering at the time he received the injury of a preexisting and progressive disease. *Hanson v. Independent Sch. Dist.* 11-J, 57 Idaho 297, 65 P.2d 733 (1937).

While the board was authorized to approve an agreement of settlement, such agreement had to incorporate; otherwise there would be read into the agreement, the provisions of the Workmen's Compensation Act, and it was not within the power of the board to award a lesser or different compensation to claimant than that provided by the Workmen's Compensation Act. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

**72-712. Hearings.** — Upon application of any party to the proceeding, or when ordered by the commission or a member thereof or a hearing officer, referee or examiner, and when issues in a case cannot be resolved by pre-hearing conferences or otherwise, a hearing shall be held for the purpose of determining the issues. [I.C., § 72-712, as added by 1971, ch. 124, § 3, p. 422.]

## **JUDICIAL DECISIONS**

### **ANALYSIS**

Employer-employee relationship.  
Hearing called by commission.  
Procedure.

#### **Employer-Employee Relationship.**

The issue of whether an employer-employee or principal-independent contractor relationship exists is to be determined from all the facts and circumstances established by the evidence. *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978).

#### **Hearing Called by Commission.**

The commission need not wait for a claimant to file an application for a hearing but may itself call a matter for hearing. *Howard v. FMC Corp.*, 98 Idaho 465, 567 P.2d 10 (1977).

#### **Procedure.**

Where the Idaho State Insurance Fund (SIF) appealed from final decisions and orders of the Industrial Commission to pay for approved medical services performed on two claimants' work-related injuries, contending that the commission's dispute resolution system for the approval of medical charges violated constitutional, statutory, and equitable

concerns, the Supreme Court of Idaho found that although the SIF did not have a full, formal hearing, it had submitted briefs before the commission and filed an appeal from the commission's decision with the court, thus the dispute resolution system enacted by the commission for the approval of disputed medical charges did provide parties with the opportunity to be heard at a meaningful time and in a meaningful manner. *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 911 P.2d 754 (1996).

The procedures adopted by the industrial commission for determining a reasonable attorney fee did not violate either the Due Process Clause or this section because appellant was given an opportunity to be heard at a meaningful time and in a meaningful manner; and the commission's determination was supported by substantial and competent evidence and was not arbitrary or capricious. *Swett v. St. Alphonsus Reg'l Med. Ctr.*, 136 Idaho 74, 29 P.3d 385 (2001).



## DECISIONS UNDER PRIOR LAW

**Investigations by Board.**

Board had the power to investigate, to examine witnesses, and to call a matter for hearing, however, statute making such provision was not mandatory and stated that the

board "may" call for a hearing, so that the filing of claim with board and filing of petition for hearing were duties of employee. *Shell v. Standard Oil Co.*, 93 Idaho 370, 461 P.2d 265 (1969).

**72-713. Notice of hearings — Service.** — The commission shall give at least ten (10) days' written notice of the time and place of hearing and of the issues to be heard, either by personal service or by registered or certified mail. Service by mail shall be deemed complete when a copy of such notice is deposited in the United States post office, with postage prepaid, addressed to a party at his last known address, as shown in the records and files of the commission. Evidence of service by certificate or affidavit of the person making the same shall be filed with the commission. [I.C., § 72-713, as added by 1971, ch. 124, § 3, p. 422.]

## JUDICIAL DECISIONS

**Notice of Hearing.**

Where a notice of hearing did not mention the precise issue to be heard nor the commission's intention to raise an entirely new issue, such notice violated the express requirements of this section. *White v. Idaho Forest Indus.*, 98 Idaho 784, 572 P.2d 887 (1977).

Where the employer did not receive copies of other correspondence between the claimant and the commission, but it did receive a copy of the September 18, 1977, letter from the claimant which the commission considered as additional evidence, and the letter was attached to the notice sent by the commission which informed the employer that if it objected to having the letter considered by the commission or wanted to submit written arguments it could do so within 15 days, but where the employer failed to file written ob-

jections, failed to demand that the claimant attest to the statements in his letter, and failed to demand any right of cross examination with regard to the same, the notice sufficiently complied with this section and was fair notice of how the commission intended to proceed. *Mager v. Garrett Freightlines*, 100 Idaho 469, 600 P.2d 773 (1979).

Where notice for hearing stated that the purpose of the hearing was to "determine the amount of benefits to which claimant is entitled," the Commission's use of the term "benefits" in the notice was sufficient to give employer notice pursuant to this section that the applicability of § 72-210 was at issue. *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992).

**Cited in:** *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005).

## DECISIONS UNDER PRIOR LAW

**Notice of Hearing.**

Notice of hearing served on attorney of record was valid notice. *Egus v. Triumph*

*Mining Co.*, 71 Idaho 354, 232 P.2d 136 (1951).

**72-714. Hearings, where and how conducted.** — (1) The hearing may be held in the city or town or within the county where the injury or disease occurred, or in such other place as the commission deems most convenient for the parties and most appropriate for ascertaining their rights.

(2) If the place of hearing claimant's testimony is outside the county and the claimant's presence is deemed necessary, the commission shall cause or require to be paid to the claimant a reasonable sum to reimburse him for his travel expense, unless otherwise agreed by the parties.

(3) The commission, or member thereof, or a hearing officer, referee or examiner, to whom the matter has been assigned, shall make such inquiries and investigations as may be deemed necessary.

(4) The authority of the commission, or of a member, hearing officer, referee or examiner, shall include the right to enter premises at any reasonable time where an injury, disease or death has occurred and to make such examination of any tool, appliance, process, machinery or environmental or other condition as may be relevant to a determination of the cause and circumstances of the injury, disease, or death. [I.C., § 72-714, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Appeals from the board shall be limited to a review of questions of law, Const., art. 5, § 9.

Assignment to one member, § 72-506.  
As to process and procedure, § 72-708.

### JUDICIAL DECISIONS

#### ANALYSIS

Appealable order.  
Burden of proof.  
Evidence.  
—Medical.  
—Sufficiency.

#### Appealable Order.

Appeal from the decision of the Idaho industrial commission was dismissed and remanded; the decision was not a final appealable order where the commission could not establish from the record the extent of the industrial special indemnity fund's liability, and retained jurisdiction over the issue to enable the parties to resolve the matter or present additional evidence for consideration. *Hartman v. Double L Mfg.*, 141 Idaho 456, 111 P.3d 141 (2005).

#### Burden of Proof.

A compensation claimant had the burden of proving that his heart attack was caused by employment-related stress. *Beslanwitch v. Valley Dodge Center, Inc.*, 98 Idaho 390, 565 P.2d 583 (1977).

#### Evidence.

Where, at a hearing before the Industrial Commission some of the evidence, albeit conflicting, indicated that claimant was employable and could perform certain jobs, the commission was entitled to consider claimant's

motivation and desire to be employed. *Frank v. Bunker Hill Co.*, 117 Idaho 790, 792 P.2d 815 (1988).

#### —Medical.

A claimant must present medical testimony to a reasonable degree of medical probability, in support of a claim for compensation. *Cole v. Stokely Van Camp*, 118 Idaho 173, 795 P.2d 872 (1990).

#### —Sufficiency.

Where there was medical evidence from two doctors, one of whom thought the claimant's elbow problem was causally related to his accident and the other doctor, who examined him right after the accident, who thought it was not related, there was substantial competent evidence to support the Industrial Commission's conclusion that claimant's elbow problems were the result of an independent, intervening cause and not causally related to his earlier on-the-job accidents. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 714 P.2d 36 (1986).

**Cited in:** *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 798 P.2d 55 (1990).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Application of section.  
Burden of proof.  
Evidence.



- Examination of witnesses.
- Expert witnesses.
- Privileged communications.
- Sufficiency.
- Taken outside of state.
- Investigations by board.
- Nature and sufficiency of findings.
- Place of hearing.
- Pleadings.
- Powers of board.
- Questions of fact.
- Res judicata.
- Review or rehearing.
- Variance.

### Application of Section.

The statute was not applicable to a hearing and decision of the board in an employment security claim. *Clark v. Bogus Basin Recreational Ass'n*, 91 Idaho 916, 435 P.2d 256 (1967).

### Burden of Proof.

The burden of proof rested upon the claimant to show that his injury was caused by accident arising out of and in the course of his employment, and also to prove his disability. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927); *Croy v. McFarland-Brown Lumber Co.*, 51 Idaho 32, 1 P.2d 189 (1931); *Dunnigan v. Shields*, 52 Idaho 195, 12 P.2d 773 (1932); *Liberg v. Genessee Union Whse. Co.*, 55 Idaho 123, 38 P.2d 999 (1934); *Webb v. Gem State Oil Co.*, 56 Idaho 465, 55 P.2d 1302 (1936); *Parkison v. Anaconda Copper Mining Co.*, 56 Idaho 610, 57 P.2d 1216 (1936); *Brooke v. Nolan*, 59 Idaho 759, 87 P.2d 470 (1939); *In re Puckett's Estate*, 59 Idaho 529, 84 P.2d 566 (1938); *Stroschein v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941); *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942); *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943); *Dyre v. Kloefer & Cahoon*, 64 Idaho 612, 134 P.2d 610 (1943); *Jensen v. Bohemian Breweries, Inc.*, 64 Idaho 679, 135 P.2d 442 (1943).

Burden of proof rested on claimant to establish probable cause of disability. *Strouse v. Hercules Mining Co.*, 51 Idaho 7, 1 P.2d 203 (1931); *In re Puckett's Estate*, 59 Idaho 529, 84 P.2d 566 (1938).

Employer claiming exemption from law under provisions of statute relating to employments exempted had burden of proving such exemption. *Gloubitz v. Smeed Bros.*, 53 Idaho 7, 21 P.2d 78 (1933). But see *Arbogast v. Jerome Co-op. Creamery*, 65 Idaho 556, 149 P.2d 230 (1944).

Claimant had burden of proving claim by a preponderance of the evidence, but not beyond a reasonable doubt. *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933); *Riley v. Boise City*, 54 Idaho 335, 31 P.2d 968 (1934); *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942); *Madariaga v. Delmar Milling Corp.*, 64

Idaho 660, 135 P.2d 438 (1943); *Morgan v. Simplot*, 66 Idaho 84, 155 P.2d 917 (1945); *Cameron v. Bradley Mining Co.*, 66 Idaho 409, 160 P.2d 461 (1945); *Miller v. State*, 69 Idaho 122, 203 P.2d 1007 (1949); *Dawson v. Potlatch Forests, Inc.*, 82 Idaho 406, 353 P.2d 765 (1960); *Duerock v. Acarregui*, 87 Idaho 24, 390 P.2d 55 (1964).

If the accident was one whose happening could not be fixed as of a specific date, it was sufficient to establish such time with reasonable probability. *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933); *Riley v. Boise City*, 54 Idaho 335, 31 P.2d 968 (1934); *Cook v. Winget*, 60 Idaho 561, 94 P.2d 676 (1939).

Claim denied because of the failure to prove that a wood tick bite was during his employment. *Vaughn v. Robertson & Thomas*, 54 Idaho 138, 29 P.2d 756 (1934).

Claimant was not bound to prove absence of other possible causes. *Leach v. Grangeville Hwy. Dist.*, 55 Idaho 307, 41 P.2d 618 (1935); *Suren v. Sunshine Mining Co.*, 58 Idaho 101, 70 P.2d 399 (1937).

In hearing on modification for changed conditions, burden was on the moving party. *Boshers v. Payne*, 58 Idaho 109, 70 P.2d 391 (1937); *Fackenthall v. Eggers Pole & Supply Co.*, 62 Idaho 46, 108 P.2d 300 (1940).

The burden was on the claimant in a compensation case to establish the relationship of employee and employer before he could recover. *In re Black*, 58 Idaho 803, 80 P.2d 24 (1938), overruled on other grounds, *Hite v. Kulhenak Bldg. Contractors*, 96 Idaho 70, 524 P.2d 531 (1974).

Burden was upon employer to prove defense that employee was intoxicated. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939).

The burden of proof was upon the dependent claimant to prove, in accordance with his condition, that transverse myelitis from which the decedent died was a result of the injury sustained by the deceased within the meaning of the Workmen's Compensation Law. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

The claimant had to prove an industrial

injury caused by accident arising out of and in the course of the employment, and in the event of death that death resulted from injury sustained. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

In contested workmen's compensation cases, claimant had the burden of proof that an accident occurred which resulted in injury or death within the terms of the act, i.e., claimant had to show by a preponderance of the evidence an unexpected, undesigned and unlooked for mishap or untoward event which happened suddenly and was connected with the industry in which it occurred. *Darvell v. Wardner Indus. Union*, 78 Idaho 309, 302 P.2d 950 (1956).

A claimant had the burden of proving compensable disablement. *Davenport v. Big Tom Breeder Farms, Inc.*, 85 Idaho 604, 382 P.2d 762 (1963).

### Evidence.

Rules of evidence in hearing before industrial accident board, see *Butler v. Anaconda Copper Mining Co.*, 46 Idaho 326, 268 P. 6 (1928).

Latitude was permitted by the board in the admission of evidence, but its findings could not be based on incompetent evidence. *Wilson v. Standard Oil Co.*, 47 Idaho 208, 273 P. 758 (1929).

Under the Workmen's Compensation Law it was not necessary to exclude the possibility or even some probability that another cause or reason may have been the true cause or reason for the damage rather than the one alleged by claimant. *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933).

In a civil case, which was applicable to workmen's compensation proceedings, facts need not have been established beyond a reasonable doubt. It was sufficient if the evidence on the whole supported the hypothesis which it was produced to prove. *Riley v. Boise City*, 54 Idaho 335, 31 P.2d 968 (1934).

Even though the evidence was in equipoise, a claimant may not recover compensation because the burden was on him to show compensable disability, and there had to be a probable and not merely a possible connection between the cause and effect. *Carlson v. F. H. DeAtley & Co.*, 55 Idaho 713, 46 P.2d 1089 (1935); *Stroschein v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941).

Where at the time of the hearing before the board the employee was insane and his testimony, for that reason, was not available, this situation made applicable the rule often applied that where the lips of a witness had been sealed by death, the presumption was indulged in the absence of proof to the contrary, that one who was killed while engaged in his duties, was exercising reasonable care and precaution for the protection and preser-

vation of his person and life, and that he was possessed of the ordinary instincts of self-preservation. *Webb v. Gem State Oil Co.*, 56 Idaho 465, 55 P.2d 1302 (1936).

Where the known facts were not equally significant where there was ground for comparing and balancing their respective values, and where the more probable conclusion was that for which the applicant for compensation contended an inference in his favor was justified. *Soran v. McKelvey*, 57 Idaho 483, 67 P.2d 906 (1937).

The mere fact that a claimant asked another employee to tell the manager of the employer that he, the claimant, had been injured in an accident, did not constitute such employee an agent of the claimant, and any conversation had between such employee and the manager in pursuance of such request, in the absence of the claimant, constituted pure hearsay and was, therefore, incompetent, and such evidence was insufficient to create a conflict, making the board's finding conclusive. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

It was not necessary that a claimant for compensation prove the exact manner in which he was injured. The law did not require such certainty of proof, and to so hold would defeat the very purpose of the Workmen's Compensation Law. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937); *Golay v. Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939).

The relation of employer and employee shown and well-nigh conceded to have existed immediately prior to the day of the accident would be presumed to continue to exist until the contrary was shown and the relationship changed. This presumption was rebuttable and slight or strong according to the attendant and surrounding circumstances, but it was legitimate for the board, and was for the Supreme Court, to consider in weighing the evidence as to deceased's status. In *re Black*, 58 Idaho 803, 80 P.2d 24 (1938), overruled on other grounds, *Hite v. Kulhenak Bldg. Contractors*, 96 Idaho 70, 524 P.2d 531 (1974).

The fact that a witness gave some evidence, by deposition or otherwise, before he was sworn will not work a reversal of an award where the objecting party was given a full opportunity to make a searching cross-examination. *Taylor v. Federal Mining & Smelting Co.*, 59 Idaho 183, 81 P.2d 728 (1938).

An employee in a proceeding for workmen's compensation was bound by the evidence of the witness which he produced. *Brooke v. Nolan*, 59 Idaho 759, 87 P.2d 470 (1939). See also *Van Meter v. Zumwalt*, 35 Idaho 235, 206 P. 507 (1922); *Groome v. Fisher*, 48 Idaho 771, 284 P. 1030 (1930); *Long v. Brown*, 64 Idaho 39, 128 P.2d 754 (1942).

The possibility or probability of another



cause of damage than that alleged by compensation claimant did not defeat recovery where he presented sufficient facts to justify a reasonable conclusion that the thing charged was the prime and moving cause. *Stilwell v. Aberdeen-Springfield Canal Co.*, 61 Idaho 357, 102 P.2d 296 (1940).

Unsworn testimony or statements received without objection, on the trial of a case, may be considered the same as any other evidence in the case, and could not be subsequently urged to invalidate the judgment or order. *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

The testimony describing the deceased's physical condition was competent, relevant and admissible but conversations not in the presence of the employer were hearsay. *Nistad v. Winton Lumber Co.*, 61 Idaho 1, 99 P.2d 52 (1940).

The industrial accident board, by reason of its experience, had to be presumed to be able to judge the causation factors in a particular case on both medical and nonmedical evidence. *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

#### —Examination of Witnesses.

Under the liberal practice that should guide the industrial accident board, the employer and insurance carrier should have been permitted to cross-examine claimant and his physician testifying with regard to claimant's previous condition, although such was beyond the scope of the direct examination. This restriction was harmless, when the witnesses were subsequently called and examined at length. *Patrick v. Smith Baking Co.*, 64 Idaho 190, 129 P.2d 651 (1942).

#### —Expert Witnesses.

Positive expert testimony would prevail over negative expert testimony. *Beaver v. Morrison-Knudsen Co.*, 55 Idaho 275, 41 P.2d 605 (1934); *In re Soran*, 57 Idaho 483, 67 P.2d 906 (1937).

The testimony of an expert as to his opinion was not evidence of a fact in dispute, but was advisory, only, to assist the triers of fact, to understand and apply the testimony of other witnesses. *Evans v. Cavanagh*, 58 Idaho 324, 73 P.2d 83 (1937); *Nistad v. Winton Lumber Co.*, 61 Idaho 1, 99 P.2d 52 (1939); *Watkins v. Cavanagh*, 61 Idaho 720, 107 P.2d 155 (1940).

Evidence of attending physicians was sufficient to sustain a finding that the employee's injury was the result of an accident, occurring during work, rather than of prior osteomyelitis, and this was true in spite of contravening expert testimony. *Arneson v. Robinson*, 59 Idaho 223, 82 P.2d 249 (1938).

The weight to be given expert testimony depended, among other things, on the expert's knowledge, his competency, the extent of his experience or study, whether the witness was

biased, the facts upon which his opinion was based, and the integrity of the witness himself. So, in a proceeding under this act, the weight to be given to the testimony of a physician, who observed and treated the claimant over a period of several months regarding permanency of the claimant's disability, was a question for the industrial accident board. *Strosheim v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941).

The weight to be afforded the testimony of a physician as an expert was for the board to determine, and there was no distinction between expert testimony and evidence of other character in this respect. *Strosheim v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941); *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

More weight had to be given to the testimony of the expert who testified from first hand knowledge gained on autopsy examination than to the testimony of one whose knowledge was based only upon hypothetical facts. *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943); *Cameron v. Bradley Mining Co.*, 66 Idaho 409, 160 P.2d 461 (1945).

Where compensation for permanent partial disability was awarded as a result of the opinions of two physicians to that effect, and the report of a third physician who refused to estimate the extent of the disability, the claimant on application filed 24 days after the conclusion of the hearing before the entire industrial accident board may be granted a rehearing to introduce testimony of three additional physicians who examined him after the first hearing that he was permanently and totally disabled. *Lay v. Idaho State Sch. and Colony*, 64 Idaho 455, 133 P.2d 923 (1943).

On medical question, opinion of experts was substantive evidence and basis of award had to be supported by substantive evidence. *Zipse v. Schmidt Bros.*, 66 Idaho 30, 154 P.2d 171 (1944).

A doctor's testimony of first hand information of claimant's condition causing his death based on a daily attendance at the hospital, study of x-rays, sputum tests, blood cultures, serological tests and stethoscopic examinations was entitled to greater weight than that of doctors based on hypothetical state of facts or x-rays. *Stralovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948).

Where claimant did not call nonresident physicians to testify, board did not err in failing to call physicians, since claimant had the right to call them, and board furthermore could not require attendance of nonresident physicians. *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949).

#### —Privileged Communications.

In proceedings under this and cognate sections, the statement of a deceased employee to a physician was competent to show how the

injury arose and whether or not it arose out of and in the course of his employment. *Hillman v. Utah Power & Light Co.*, 56 Idaho 67, 51 P.2d 703 (1935).

An attending physician's certificate as to the cause of death and report of accident to the board were admissible prima facie of the facts therein stated. *Hillman v. Utah Power & Light Co.*, 56 Idaho 67, 51 P.2d 703 (1935).

#### —Sufficiency.

Cause of death may be shown by direct or circumstantial evidence but it was not sufficient for claimant to establish a state of facts which was as consistent with as against right to compensation. *Hawkins v. Bonner County*, 46 Idaho 739, 271 P. 327 (1928); *Larson v. Ohio Match Co.*, 49 Idaho 511, 289 P. 992 (1930); *Croy v. McFarland-Brown Lumber Co.*, 51 Idaho 32, 1 P.2d 189 (1931); *Vaughn v. Robertson & Thomas*, 54 Idaho 138, 29 P.2d 756 (1934); *Parkison v. Anaconda Copper Mining Co.*, 56 Idaho 610, 57 P.2d 1216 (1936).

Evidence in the cited case was sufficient to sustain a finding that the death of the employee by paralysis was not the result of an accident. *Larson v. Callahan Canning Co.*, 53 Idaho 746, 27 P.2d 967 (1933).

In the final analysis it was for the industrial accident board to decide the value and credit to be given to evidence. *In re MacKenzie*, 54 Idaho 481, 33 P.2d 113 (1934); *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942); *Devlin v. Ennis*, 77 Idaho 342, 292 P.2d 469 (1956).

Inferences in the favor of a claimant were justified when the known facts lead to such probable conclusion. *Beaver v. Morrison-Knudsen Co.*, 55 Idaho 275, 41 P.2d 605 (1934); *In re Soran*, 57 Idaho 483, 67 P.2d 906 (1937).

The question for the board to determine in compensation cases was not whether there was corroborating evidence of the claimant, but whether there was sufficient competent evidence to establish the claim for compensation. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

Medical evidence that the conditions for which compensation was claimed could have been caused under such conditions as would require the payment of compensation, and not that it was probably so caused, was insufficient to sustain an award. *Brooke v. Nolan*, 59 Idaho 759, 87 P.2d 470 (1939).

Where there was no evidence in the record that a claimant for compensation suffered with spinal or any trouble before the accident, but that after the accident her spine was badly contracted and she walked bent over on one side, this was sufficient to establish the greater possibility that claimant's spinal trouble was caused by the accident. *Golay v.*

*Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939).

The evidence in the cited case was not insufficient as failing to show whether the injury was sustained during working hours or not. *Golay v. Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939).

Where there was no evidence whatever that the deceased was conscious of any mishap, hazard or fortuitous occurrence, or misadventure from, or by reason of, which he sustained an injury, and there being no evidence of an accident resulting in an injury to the deceased, the evidence was insufficient to award compensation for typhoid fever, allegedly contracted by a laborer while cleaning an irrigation ditch containing waste matter. *Hoffman v. Consumers Water Co.*, 61 Idaho 226, 99 P.2d 919 (1940).

Ordinarily more weight was given to testimony of one who testified from first hand knowledge than to one who testified alone on a hypothetical state of facts. *Aranguena v. Triumph Mining Co.*, 63 Idaho 769, 126 P.2d 17 (1942).

The evidence established that deceased met with an industrial accident which precipitated injury in such magnitude as to cause his death, namely a coronary attack while driving a road roller. *Laird v. State Hwy. Dep't*, 80 Idaho 12, 323 P.2d 1079 (1958).

The record was barren of any evidence tending to establish that claimant's disability, encephalitis, resulted from an "accident" within the meaning of the workmen's compensation law. *Davenport v. Big Tom Breeder Farms, Inc.*, 85 Idaho 604, 382 P.2d 762 (1963).

Finding of industrial accident board that employee of grocery chain store, suffering from a back injury, failed to prove an accident which occurred at a definite time and place caused the injury, was supported by overwhelming evidence. *Welch v. Safeway Stores, Inc.*, 87 Idaho 396, 393 P.2d 594 (1964).

#### —Taken Outside of State.

Where the parties stipulated that hearing before the industrial accident board should be held in another state, on appeal, the evidence of witness examined in such other state was treated as a stipulation by the parties that if the witnesses were called and legally sworn to testify, they would make the same statements as they did when purporting to testify in such foreign state. *Knight v. Younkin*, 61 Idaho 612, 105 P.2d 456 (1940).

Where the industrial accident board had acquired jurisdiction of the subject-matter and parties, the effect of the stipulation of parties respecting the taking of evidence without the state by the board amounted to a waiver of official or binding oath, and the taking of statements from witnesses on the cross-examination did not affect the board's



jurisdiction. *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

After the board obtained jurisdiction, a mere irregular or erroneous method of taking proof would not deprive it of jurisdiction. *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

### Investigations by Board.

Where the parties failed to produce satisfactory evidence upon any question material and necessary to a decision, it became the duty of the board to make full and exhaustive inquiry and it might examine any witness at the conclusion of his direct or cross-examination and it might also subpoena and examine other competent witnesses. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934); *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937); *Nistad v. Winton Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938); *Watkins v. Cavanagh*, 61 Idaho 720, 107 P.2d 155 (1940); *Dehlin v. Shuck*, 63 Idaho 620, 124 P.2d 244 (1942); *Lay v. Idaho State Sch. and Colony*, 64 Idaho 455, 133 P.2d 923 (1943); *Hagadone v. Kirkpatrick*, 66 Idaho 55, 154 P.2d 181 (1944).

The board was an administrative and fact-finding body, exercising special judicial functions, and as such, it is its duty to ascertain and produce, or cause to be produced, all available, competent and material evidence concerning any and all claims presented to it for consideration and allowance. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

The statute contemplated, at least in part, ex parte investigation by the board. *McGarrigle v. Grangeville Elec. Light & Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939).

Board had the power to investigate, to examine witnesses, and to call a matter for hearing, however, statute relating to board's power to call hearing was not mandatory and stated that the board "may" call for a hearing, so that the filing of a claim with board and filing of petition for hearing were duties of employee. *Shell v. Standard Oil Co.*, 93 Idaho 370, 461 P.2d 265 (1969).

### Nature and Sufficiency of Findings.

Where three doctors testified positively that there was no connection between the accident and a cancer producing an employee's death, which evidence was opposed by the testimony of one doctor, and the industrial accident board found in accordance with the evidence of the three doctors, such finding would not be disturbed on appeal. *Smith v. White Pine Lumber Co.*, 53 Idaho 808, 27 P.2d 965 (1933).

When a claimant had failed or overlooked submitting evidence to establish the amount of compensation to which he was entitled, and there was no question but that he was enti-

tled to compensation, then it was the duty of the board to call attention to such failure and see to it that whatever evidence was available to establish such fact was presented, and then make the necessary findings of fact. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934); *Watkins v. Cavanagh*, 61 Idaho 720, 107 P.2d 155 (1940).

It was the duty of the industrial accident board to make specific and necessary findings of fact upon which to predicate an award. In re *MacKenzie*, 54 Idaho 481, 33 P.2d 113 (1934).

Where the industrial accident board found that an employee met his death by accident arising out of and in the course of his employment, this constituted but an ultimate conclusion of both law and fact, and was insufficient upon which to base an award, unless sufficient specific facts were found. In re *MacKenzie*, 54 Idaho 481, 33 P.2d 113 (1934).

Fragmentary and negative items of testimony were not sufficient to defeat the recovery of compensation, neither was such evidence sufficient to constitute a substantial conflict in the testimony making board's findings conclusive. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

Where the findings of the industrial accident board disclosed that the death of an employee resulted from unknown causes, and thereafter a finding followed that his death was caused by a disease, they were so contradictory that they would not warrant denial of compensation. *Nistad v. Winton Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938).

Where the board failed to make a finding, in order to properly enter an order awarding compensation, or denying it, the case would be remanded to the board to make specific findings to supply those lacking. *Smith v. Mercy Hosp.*, 60 Idaho 674, 95 P.2d 580 (1939).

The board's findings were conclusive as to the fact that death was caused by an occupational disease. *Foote v. Hecla Mining Co.*, 62 Idaho 79, 108 P.2d 1030 (1940).

Where the testimony was conflicting as to whether an agent of the employer had knowledge of the accident within a few days after it occurred, and the industrial accident board made no finding on the issue framed by the petition and answer as to whether the notice was given, as to whether employer or its agent had knowledge of the accident, and as to whether the employer had been prejudiced by the delay in giving a notice thereof, a failure to find, on such issues, required a reversal of an award and a remand of the proceeding to the board, with direction to make findings of fact on the issue and make the award accordingly. *Clayton v. Hercules Mining Co.*, 63 Idaho 301, 119 P.2d 890 (1941).

The industrial accident board's finding that

the compensation claimant on a certain date commenced working for a named company and "had worked there ever since," earning specified daily wages, although ambiguous, would not be disturbed by the Supreme Court nor the cause remanded with directions to the board to find specifically in conformity with the fact that the claimant, after injury, had not returned to his usual occupation and work, and that he only worked about one-half of the time. *Strosheim v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941).

The rule that the proceedings under the Workmen's Compensation Law were to be liberally construed would apply to findings of fact and the sufficiency thereof made by the industrial accident board. *Strosheim v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941); *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943); *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

Finding that claimant's condition was "the result of a personal injury by accident arising out of and in the course of employment" was a conclusion of law. *Dyre v. Kloepfer & Cahoon*, 64 Idaho 612, 134 P.2d 610 (1943).

A finding by the industrial accident board that an employee's death was the result of an accidental fall in the course of his employment, and that his work simply augmented the injury, was supported by competent evidence and was sufficient to support an award of compensation for his death. *Bishop v. Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

In application by employee who had been involved in two separate compensable accidents, the question of whether the disability was the result of either one or both of the accidents, was one of fact to be determined by the board. *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

Board was required to make specific findings of fact, and statements, observations, recitals and excerpts from the testimony, or method of reason by which conclusion was reached were not proper or required. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

### Place of Hearing.

Board did not err in setting hearing for modification in county other than that in which accident occurred, where parties by stipulation in original proceeding agreed that case could be set in another county. *Egus v. Triumph Mining Co.*, 71 Idaho 354, 232 P.2d 136 (1951).

### Pleadings.

Where the dependent of an employee in the application for a hearing before the board alleged that on or about a stated date the deceased was injured by accident arising out of and in the course of his employment, during the regular hours and course thereof, that

his death resulted from said injury on a stated date, which allegation was admitted by the employer and insurance carrier, except that the death of the employee resulted from an injury alleged in the mentioned paragraph of the claim, under these circumstances, there was no basis for the contention that the claimant did not produce sufficient evidence with regard to the accident since the above mentioned answer admitted it. *Soran v. McKelvey*, 57 Idaho 483, 67 P.2d 906 (1937).

### Powers of Board.

The validity of the board's judgment or award on direct attack had to be affirmatively shown and no presumptions in favor of jurisdiction or due process would be indulged in. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923), overruled on other grounds, *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982).

The board, exercising special judicial functions, had to pursue the same general conduct as a court in safeguarding fundamental, constitutional rights, which could not be abridged except after due notice and fair hearing. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923), overruled on other grounds, *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982).

The statute contemplated, at least in part, ex parte investigation by the board. *McGarigle v. Grangeville Elec. Light & Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939); *Hamlin v. University of Idaho*, 61 Idaho 570, 104 P.2d 625 (1940).

The industrial accident board could not legally hold hearing or conduct trials beyond the borders of the state, and such power could not be conferred by agreement of parties. *Knight v. Younkin*, 61 Idaho 612, 105 P.2d 456 (1940).

The purpose of this statute was to make convenient attendance at the hearing by parties litigant and their witnesses, and if it did not meet the convenience of the parties and witnesses to have the hearing held in the county where the accident occurred, this right might be waived. *Knight v. Younkin*, 61 Idaho 612, 105 P.2d 456 (1940).

The board was fundamentally a fact finding body. Its application of the law was incidental to its administrative function. It applied the law to the facts as found by it, not to facts found by some other officer or agency. In re *Markham's Inc.*, 79 Idaho 307, 316 P.2d 553 (1957).

### Questions of Fact.

Whether or not a fall produced or aggravated a condition resulting in an employee's death was a question of fact for the industrial accident board. *Smith v. White Pine Lumber Co.*, 53 Idaho 808, 27 P.2d 965 (1933).

It was not necessary to establish the exact



cause of an employee's death if the evidence was sufficient to show the probable cause. *Nistad v. Winton Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938).

As to whether or not an injury was by accident, was a fact to be determined by the board. *Smith v. Mercy Hosp.*, 60 Idaho 674, 95 P.2d 580 (1939).

Members of the board were triers of fact, final judges of weight and credence to be given opinion of experts hypothetically stated. *Cameron v. Bradley Mining Co.*, 66 Idaho 409, 160 P.2d 461 (1945), quoting with added emphasis, *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943).

Whether an injury arose out of and in the course of employment was a question of fact to be determined by the industrial board under the facts and circumstances of each particular case. *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946).

#### **Res Judicata.**

The doctrine of *res judicata* had no application on applicant's claim for death benefits under the Firemen's Retirement Fund and in regard to respondent's plea of the statute of limitations under the Workmen's Compensation Law the industrial accident board had ruled by virtue of provisions relating to claims, process, hearing and appeals that the statutes were by reference a part of Firemen's Retirement Act. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957).

#### **Review or Rehearing.**

Hearing before commissioner should have been full and complete and it would seem that industrial accident board should not have admitted second hearing except on very strong showing. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923).

The decision of the industrial accident board was final, from which an appeal lay to the Supreme Court (formerly district court) and which had to be taken within 30 days after a copy thereof had been sent to the parties, and there was no provision of the law requiring a petition for review where the matter was heard before the whole board and

not a member thereof. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

Board had jurisdiction from commencement of proceeding until an appeal was taken or time for appeal had expired, during which time the board might and on proper showing should rehear the case and take additional testimony. *Dehlin v. Shuck*, 63 Idaho 620, 124 P.2d 244 (1942).

All reasonable inferences drawn by the triers of the facts from the evidence would be sustained on review. *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946).

Members of the industrial accident board were the triers of the facts — the final judges of the weight and credibility to be given the opinion of experts hypothetically stated. *Stralovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948).

Findings of the board when supported by substantial competent evidence were conclusive on appeal. *Swan v. Williamson*, 74 Idaho 32, 257 P.2d 552 (1953).

#### **Variance.**

Because a claimant stated, in his report to the industrial accident board, that a splinter entered his eye while he was prying the fender brace of an automobile in place, and at the hearing he testified he did not know just how the accident happened, whether the splinter flew up into his face, or whether he fell against the fender stick, was insufficient to authorize the board in denying him compensation on the ground that the two statements were diametrically opposed. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

Variance between claim for workmen's compensation and proof did not warrant denial of an award. *Nistad v. Winton Lumber Co.*, 61 Idaho 1, 99 P.2d 52 (1939).

The theory upon which a claimant proceeds was immaterial; if the evidentiary facts entitled him to relief, such relief would be granted. *Goasland v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940); *Zapantis v. Central Idaho Mining & Milling Co.*, 64 Idaho 498, 136 P.2d 154 (1943); *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

### **RESEARCH REFERENCES**

**A.L.R.** — Comment note on hearsay evidence proceedings before state administrative agencies. 36 A.L.R.3d 12.

**72-715. Disobedience to commission's directive process.** — If any person in proceedings before the commission or a member thereof, or hearing officer, referee or examiner, disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to

obstruct the same or neglects to produce, after having been ordered to do so, any pertinent book, paper or document or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath or affirmation as a witness, or after taking the oath or affirmation refuses to be examined according to law, the commission, or member thereof, or hearing officer, referee or examiner, shall certify the facts to the district court in the jurisdiction where the offense is committed and the court, if the evidence so warrants, shall punish such person in the same manner and to the same extent as for contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process in the presence of the court. [I.C., § 72-715, as added by 1971, ch. 124, § 3, p. 422.]

### JUDICIAL DECISIONS

#### Contempt Proceedings.

Once the industrial commission determined that its order had been disobeyed, the commission was required to certify the facts to the district court for contempt proceedings, and

the district court then has the discretion to determine whether a contempt sanction is warranted under the facts as certified by the commission. *Simpson v. Louisiana-Pacific Corp.*, 134 Idaho 209, 998 P.2d 1122 (2000).

**72-716. Record of proceedings — Service of order or award.** — A decision of the commission together with the transcript of the evidence, findings of fact, rulings of law, award or order, and any other matter pertinent to the questions arising during the hearing shall be filed in the office of the commission. A copy of the decision shall be immediately sent to the parties by United States mail. [I.C., § 72-716, as added by 1971, ch. 124, § 3, p. 422.]

### JUDICIAL DECISIONS

#### Findings of Fact.

Where Industrial Commission weighed conflicting testimony of supervisor, who claimed that he reprimanded unemployment compensation claimant regarding sexual harassment report because he believed it was filed without any basis, and testimony of claimant, who claimed she filed report because she was directed to by management and who commu-

nicated such reasoning to her supervisor, who refused to withdraw reprimand, the Commission satisfied statutory obligation of fact finding in support of its conclusion that claimant quit for good cause. *Reedy v. M.H. King Co.*, 128 Idaho 896, 920 P.2d 915 (1996).

**Cited in:** *Wulff v. Sun Valley Co.*, 127 Idaho 71, 896 P.2d 979 (1995).

**72-717. Effect of decision by one member or assigned officer — Claim for review.** — If the matter has been assigned for hearing by a member, hearing officer, referee, or examiner, the record of such hearing, together with the recommended findings and determination, shall be submitted to the commission for its review and decision. [I.C., § 72-717, as added by 1971, ch. 124, § 3, p. 422.]

### JUDICIAL DECISIONS

#### Findings of Fact.

Findings of fact made by the referee are, under § 72-506(2) and this section, merely

recommendations to the state industrial commission which, upon reviewing those findings, can either adopt them or enter its own find-



ings. *Lorca-Merono v. Yokes Wash. Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002).

**Cited in:** *Lampe v. Zamzow's, Inc.*, 102 Idaho 126, 626 P.2d 782 (1981).

#### DECISIONS UNDER PRIOR LAW

##### Review.

Upon filing of claim for review, board had to hear parties upon their claim or application for review of hearing, but law made it optional with board to either "hear the evidence in regard to any or all matters pertinent thereto," and "revise the decision of the member in whole or in part or refer the matter back to the member for further findings of fact." *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923).

Board might, after it had heard parties upon their claim or application for review,

ratify findings of member who first tried case and decline to hear more evidence. After it had thus ratified findings of member and notified parties, its decision was final insofar as award was concerned. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923).

A voluntary association of designated member and associated hospitals was entitled to file a petition in behalf of its members to review order of board fixing hospital room rates. *In re Idaho Hosp. Ass'n*, 73 Idaho 320, 251 P.2d 538 (1952).

**72-718. Finality of commission's decision.** — A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code. [I.C., § 72-718, as added by 1971, ch. 124, § 3, p. 442; am. 1977, ch. 300, § 1, p. 838.]

#### JUDICIAL DECISIONS

##### ANALYSIS

Ambiguous agreement.

Appeal.

— Final order.

Commission's authority.

Findings on reconsideration.

Lump sum agreement.

Matters actually adjudicated.

Motion for reconsideration.

— Timely filing.

Parties bound by agreement.

Permanent disability.

Referee's findings.

Reopening award.

Retention of jurisdiction.

Settlement.

— With employer.

##### Ambiguous Agreement.

Where a compensation agreement was ambiguous as to whether it determined claimant's disability or only impairment, summary judgment based on the statute of limitations on claimant's subsequent application for modification was precluded; if the agreement only determined impairment, then the award

therein was not final as to disability, and § 72-706 would have been the applicable statute of limitations. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

##### Appeal.

Where the commission initially dismissed the Industrial Special Indemnity Fund (ISIF)

by order dated August 27, 1979, but apparently did not consider that order to be final because in its findings of fact, conclusions of law and award, dated October 9, 1979, the commission dismissed ISIF and based that dismissal upon those findings of fact, the August order was not a final order, and therefore, the appeal filed November 13, 1979 was timely. *Royce v. Southwest Pipe*, 103 Idaho 290, 647 P.2d 746 (1982).

Referee's order denying motion to compel discovery was not a final decision of the commission; therefore, there was no right to appeal from the referee's order. *Peterson v. Farmore Pump & Irrigation*, 119 Idaho 969, 812 P.2d 276 (1991).

#### —Final order.

The commission did not adopt, approve, or confirm the referee's ruling on the admissibility of the testimony of the witness. The Findings of Fact, Conclusions of Law, and Proposed Order contained no reference to the referee's decision regarding the testimony of the witness, nor did the record indicate that the plaintiff sought, at any time, to bring the ruling to the commission's attention, either by filing a motion to reconsider or by arguing the issue in a post-hearing briefing. Since the commission did not specifically approve or adopt the referee's ruling, it was not a final appealable order pursuant to I.A.R. 11(d). *Dehlbom v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 930 P.2d 1021 (1997).

#### Commission's Authority.

The industrial commission's authority under this section is not limited to correcting oversights or making technical corrections, and it did not exceed its authority by reversing itself from its first decision to its decision upon reconsideration. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

The authority of the industrial commission to reconsider its decisions is not analogous to the limitations imposed upon the trial courts by I.R.C.P. 59 and 60; both this section and § 72-719 authorize the commission to reconsider its decisions on its own motion upon the showing set out in those statutes. *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

Since plaintiff did not indicate to the referee prior to the hearing that her benefits calculation was a disputed issue, or move for reconsideration or rehearing under this section, she was bound by the commission's findings and could not then challenge them on appeal. *Phinney v. Shoshone Medical Ctr.*, 131 Idaho 529, 960 P.2d 1258 (1998).

The commission did not err in deciding to reconsider its initial determination that an award for fees should be made, because the commission has the authority to revisit and to

correct an erroneous determination previously made, so long as the time frame set forth in this section is adhered to. *Dennis v. School Dist. 91*, 135 Idaho 94, 15 P.3d 329 (2000).

#### Findings on Reconsideration.

Where there was nothing in the industrial commission's order on reconsideration to indicate that the commission abandoned its initial finding that the plaintiff suffered from a pre-existing condition, the award of worker's compensation was reversed. *Demain v. Bruce McLaughlin Logging*, 132 Idaho 782, 979 P.2d 655 (1999).

#### Lump Sum Agreement.

A lump sum settlement agreement constitutes a final decision of the industrial commission which is subject to a motion for reconsideration or rehearing under the provisions of this section. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986).

A lump sum worker's compensation agreement was not set aside where it was signed by the claimant, approved by the Commission, no rehearing or reconsideration was requested within twenty days, and there was no showing of fraud. *Sadiku v. Aatronics Inc.*, — Idaho —, 128 P.3d 947 (Jan. 25, 2006).

#### Matters Actually Adjudicated.

The legislature, by adding the phrase "as to all matters adjudicated" when they enacted this section in 1971, intended that decisions of the commission be final and conclusive only as to those matters actually adjudicated; this is a departure from the concept of pure res judicata, applied prior to 1971, which accorded decisions by the commission finality and conclusiveness as to all matters which were, or could have been, adjudicated. Therefore, a compensation agreement approved by the commission was only final and conclusive as to those matters actually considered by the commission. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984).

A compensation agreement is res judicata only with respect to matters already decided by that agreement; since the compensation agreement between the claimant and the employer did not determine the retraining benefits, it could not be considered res judicata with respect to any new awards. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

#### Motion for Reconsideration.

Where agreement between claimant and the Industrial Special Indemnity Fund stated that claimant would be paid monthly benefits at the statutory rate and recited claimant's hourly wage at \$5.06 per hour, and furthermore, the agreement explicitly stated that "no portion is a mere recital," the industrial com-



mission correctly determined that the hourly wage recited in the agreement was the base rate to be used in computing claimant's average weekly wage; if claimant believed that his hourly wage was something other than the \$5.06 amount, the time to have raised this issue was during the settlement process or by way of a motion for rehearing or reconsideration. *Drake v. State, Indus. Special Indemnity Fund*, 128 Idaho 880, 920 P.2d 397 (1996).

Any party could move for reconsideration or rehearing of a decision, but it did not obligate the Idaho industrial commission to grant such requests, and although the claimant presented a very detailed brief in support of her motion for reconsideration or rehearing, she did not produce new law or evidence to necessitate a rehearing or reconsideration. *Curtis v. M. H. King Co.*, — Idaho —, 128 P.3d 920 (2005).

#### —Timely Filing.

The terms "file" and "make" as used in this section have different meanings; therefore, motions to set aside the award and to reconsider must be made, not filed, within 20 days in order to be valid. *Wright v. Willer*, 111 Idaho 474, 725 P.2d 179 (1986).

Where the employer placed the motion to vacate the default judgment and motion for reconsideration in the mail 20 days after the industrial commission's decision, and the motion was received and docketed by the commission 21 days after the decision, the motions were timely filed. *Wright v. Willer*, 111 Idaho 474, 725 P.2d 179 (1986).

#### Parties Bound by Agreement.

Where the industrial commission approved an agreement between the claimant and the employer's surety, to which the Industrial Special Indemnity Fund (I.S.I.F.) was not a party, only the employee and the employer and his surety could rely upon the finality of that award under § 72-711 and this section; thus, the I.S.I.F. could not claim that approval of the compensation agreement foreclosed proceedings against it. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

Where the claimant expressed his desire for a lump sum settlement and even after the settlement was initially rejected by the industrial commission, claimant still maintained that he wanted the agreement approved, the industrial commission correctly held that claimant's allegations of manifest injustice were insufficient, even if proven, to permit the commission to set aside the lump sum compensation agreement. *Harmon v. Lute's Constr. Co.*, 112 Idaho 291, 732 P.2d 260 (1986).

A compensation agreement between a workmen's compensation claimant and the State Insurance Fund which clearly provided

for an award of disability, and which was approved by the industrial commission, became an "award" which, under § 72-711 and this section was final and conclusive as to claimant's disability and § 72-706 had no application to it; modifications to the agreement were governed by § 72-719 and the agreement could not be modified because claimant's application for modification was not filed within 5 years of the date of the injury, even though the application was filed within one year of payment of medical benefits. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

#### Permanent Disability.

A permanent disability rating and award is final if the commission evaluated both the present and probable future ability of the claimant to engage in gainful activity. *Frank v. Bunker Hill Co.*, — Idaho —, 124 P.3d 1002 (2005).

#### Referee's findings.

Claimant could not appeal referee's denial of his request to reopen his workers' compensation case because the industrial commission did not approve and confirm the denial; order was not appealable because it was not an order of the commission, but only of the referee. This section provides a procedure by which a party may seek a ruling by the commission on a matter decided by a referee that was not confirmed or approved by the commission in its approval, confirmation, and adoption of the referee's findings and conclusions. *Wheaton v. Industrial Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

#### Reopening Award.

When an industrial commission award has been made, this section provides that the decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; however, there is a limited authority in I.C. § 72-719 to reopen such a "final and conclusive" award. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

#### Retention of Jurisdiction.

Whenever the industrial commission explicitly retains jurisdiction over a matter, that act by its very nature infers that there is neither a final determination of the case nor a final permanent award to the employee. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

#### Settlement.

##### —With Employer.

Employee's claim against Industrial Special Indemnity Fund for benefits attributable to a pre-existing physical impairment was not precluded by an earlier settlement agreement

between employee and his employer. *Tagg v. State, Indus. Special Indem. Fund*, 123 Idaho 95, 844 P.2d 1345 (1993).

**Cited in:** *Department of Emp. v. St. Alphonsus Hosp.*, 96 Idaho 470, 531 P.2d 232 (1975); *Lampe v. Zamzow's, Inc.*, 102 Idaho 126, 626 P.2d 782 (1981); *Shea v. Bader*, 102 Idaho 697, 638 P.2d 894 (1981); *Henderson v.*

*State*, 110 Idaho 308, 715 P.2d 978 (1986); *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989); *Haffaker v. Red Lion Motor Inn-Riverside*, 122 Idaho 464, 835 P.2d 1275 (1992); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995); *Kirk v. Karcher Estates, Inc.*, 135 Idaho 230, 16 P.3d 906 (2000).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

##### Appeal.

Members participating in hearing.  
Second hearing.

##### Appeal.

The decision of the industrial accident board was final, from which an appeal lay to the Supreme Court (formerly district court) and which had to be taken within 30 days after a copy thereof had been sent to the parties, and there was no provision of the law requiring a petition for review where the matter was heard before the whole board and not a member thereof. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

Where parties entered into a compensation agreement, which settlement was approved by the board, making of agreement constituted an admission by the employer and surety, as equivalent to finding of fact by the board that claimant was engaged in covered employment, and since no appeal was taken from order of the board affirming the settlement, such award was res adjudicata on question as to whether claimant was engaged in covered employment at time of the accident. *Blackburn v. Olson*, 69 Idaho 428, 207 P.2d 1160 (1949).

If there was no conflict in evidence, only one inference, the determination as to whether accident arose out of and in the course of employment was a conclusion of law reviewable by Supreme Court. *Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953).

##### Members Participating in Hearing.

In a hearing held before the industrial accident board in which there was oral testimony, a finding joined in by all three members of the board was proper though only two members participated in the hearing. *Turner v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956).

##### Second Hearing.

The board's denial of second hearing would be upheld in the absence of an abuse of discretion. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923); *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

## **72-719. Modification of awards and agreements — Grounds —**

**Time within which made.** — (1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:

- (a) Change in the nature or extent of the employee's injury or disablement; or
- (b) Fraud.

(2) The commission on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this law, and shall make its findings of fact, rulings of law and order or award, file the same in the office of the commission, and immediately send a copy thereof to the parties.

(3) The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of



an occupational disease, may review a case in order to correct a manifest injustice.

(4) This section shall not apply to a commutation of payments under section 72-404. [I.C., § 72-719, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Agreement of parties subject to modification, § 72-711.

**Compiler's Notes.** — The words "this law"

refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

### JUDICIAL DECISIONS

#### ANALYSIS

Application.  
 Authority to reopen.  
 Basis for review.  
 Causal relationship.  
 Change in condition.  
 Commission's authority.  
 Construction.  
 Evidence.  
   — Weight.  
 Failure to make findings.  
 Finality of award.  
 Findings of commission.  
 Grounds for modification awards.  
 Manifest injustice.  
 Party.  
 Retention of jurisdiction.  
 Review or rehearing.  
 Settlement.  
   — With employer.  
 Sufficiency of evidence.  
 Time for application.

#### Application.

Where a previous compensation agreement had been entered into between the claimant and the employer, the claimant's action seeking benefits for total and permanent disability was not brought pursuant to this section, where the compensation agreement simply reaffirmed that previous payments had been made, and the payments were made voluntarily by the employer thereby bringing the case within the application of subsection (2) of § 72-706. *Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 401 (1988).

This section may apply if a compensation agreement was intended to provide compensation to claimant for permanent disability. *Walters v. Blincoe's Magic Valley Packing Co.*, 117 Idaho 239, 787 P.2d 225 (1989).

#### Authority to Reopen.

When an Industrial Commission award has been made, § 72-718 provides that the decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; however, there is a limited authority in this section to reopen such a

"final and conclusive" award. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

#### Basis for Review.

The time within which a motion to review can be brought is governed by the five-year period set forth in subsection (3) of this section and not by a mere claim of prejudice. If prejudice were used as the standard for review, a case might never be reopened since it is difficult to imagine a situation in which the other party would not be prejudiced in some manner. *Iverson v. Farming*, 103 Idaho 527, 650 P.2d 669 (1982).

#### Causal Relationship.

Where the commission found that claimant had established that his condition had changed since industrial accident and that he was totally and permanently disabled, but the commission also found that claimant had not established, to a reasonable degree of medical probability, a causal relationship between his change in condition and the accident and injury, and where such findings were supported by substantial evidence, order denying

modification of settlement agreements was proper. *Carter v. Garrett Freightlines*, 105 Idaho 59, 665 P.2d 1069 (1983).

### **Change in Condition.**

Substantial evidence supported a change of condition relative to worker's shoulder injury resulting in an increase in her permanent physical impairment rating from 15% to 30% where doctor's file memoranda established that worker's worsened shoulder condition was directly related to her industrial injury and where commission chose to rely on another doctor's 30% impairment rating. *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989).

### **Commission's Authority.**

The authority of the Industrial Commission to reconsider its decisions is not analogous to the limitations imposed upon the trial courts by I.R.C.P. 59 and 60; both § 72-718 and this section authorize the commission to reconsider its decisions on its own motion upon the showing set out in those statutes. *Campbell v. Key Millwork & Cabinet Co.*, 116 Idaho 609, 778 P.2d 731 (1989).

### **Construction.**

As used in subsection (3) of this section, the term "manifest injustice" as a ground for reopening and review of an order must be construed broadly. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

### **Evidence.**

#### **—Weight.**

It is by now axiomatic that the weighing of conflicting evidence is left to the sound discretion of the Industrial Commission and will not be overturned on appeal unless its conclusion is clearly erroneous, i.e., unsupported by substantial competent evidence on the record. *Sweeney v. Great W. Transp.*, 110 Idaho 67, 714 P.2d 36 (1986).

### **Failure to Make Findings.**

Where the commission did not make specific findings to support its conclusion that manifest injustice was not shown, but instead based its decision on the referee's recommendation, the Supreme Court was unable to review the issue adequately and therefore, the cause would be remanded to the commission to review their decision and to make specific findings in order that the Supreme Court could properly review the issue. *Iverson v. Farming*, 103 Idaho 527, 650 P.2d 669 (1982).

### **Finality of Award.**

Except as provided by this section, an award under the provisions of § 72-711 becomes final and conclusive if no appeal is taken. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

Whenever the Industrial Commission explicitly retains jurisdiction over a matter, that act by its very nature infers that there is neither a final determination of the case nor a final permanent award to the employee. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

Subsection (3) of this section does not give the Industrial Commission the authority to rescind a prior order that has become final and conclusive for all purposes once the time for appeal has expired under the Employment Security Law. Although subsection (3) of this section, part of Idaho's comprehensive Worker's Compensation Law, provides for correction due to manifest injustice, there is no corresponding statute under Idaho's Employment Security Law. *Welch v. Del Monte Corp.*, 128 Idaho 513, 915 P.2d 1371 (1996).

Employee was time-barred from claim for additional compensation and a total permanent disability rating arising from 1980 mining injury, where the commission was permitted to include and consider evidence of a probable change in the employee's condition when rendering its final decision more than 5 years previously. *Frank v. Bunker Hill Co.*, — Idaho —, 124 P.3d 1002 (2005).

### **Findings of Commission.**

Where the Industrial Commission in its findings of fact and conclusions dealt only with the issue of whether the industrial accident aggravated the claimant's preexisting condition, the commission should have also made the first determination, i.e., did the claimant's total and permanent disability arise by reason of the combined effects of both the preexisting impairment (multiple sclerosis) and the subsequent injury sustained in the industrial accident, since if that determination had been made, it may very well have also followed that the initial award was a manifest injustice. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

Where the claimant received workman's compensation of 17½% of the whole man for an accident sustained while hauling timber, but the Industrial Commission failed to consider the extent to which the claimant's preexisting illness, multiple sclerosis, affected the commission's determination, the proceedings had to be remanded so that the commission could determine the liability, if any, of the Idaho Special Indemnity Fund. *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

### **Grounds for Modification Awards.**

Prior to 1971 the only basis for a modification of an award was on the ground of a change in condition, however, now modification of awards may be made on the following grounds: (a) change in the nature or extent of the employee's injury or disablement; or (b) fraud, and the commission, on its own motion



may review a case in order to correct a manifest injustice. *Frank v. Bunker Hill Co.*, 117 Idaho 790, 792 P.2d 815 (1988).

As the Industrial Commission correctly opined, the fact that claimant settled for a disability award based on twenty percent of the whole man, which is equal to his permanent impairment rating, did not indicate that he has been treated unfairly; whether a claimant has suffered a permanent disability greater than permanent physical impairment is determined by assessing whether the physical impairment, taken in conjunction with non-medical factors [in I.C. § 72-430], has reduced the claimant's capacity for gainful activity; the commission noted that at the time of the hearing in December 1988, claimant was employed at a higher hourly wage than he received in the same position prior to the 1985 accidental injury, and therefore did not have a reduced capacity to engage in gainful activity. *Matthews v. Department of Cors.*, 121 Idaho 680, 827 P.2d 693 (1992).

#### **Manifest Injustice.**

*Res judicata* prevents only the relitigation of matters finally decided in an earlier decision of the commission; thus where commission approved agreement stating that claimant was 15 percent disabled and at hearing to reopen agreement on ground of change in condition, uncontradicted evidence established that she was 100 percent disabled whereupon commission ruled that claimant had not established fraud or change of condition but did not specifically rule on the applicability of the issue of manifest injustice stating that the agreement was *res judicata*, the court reversed and remanded the case so that commission could consider whether the agreement should be changed to correct a manifest injustice. *Banzhaf v. Carnation Co.*, 104 Idaho 700, 662 P.2d 1144 (1983).

Subsection (3) of this section becomes operative on the commission's own motion, but that fact does not preclude the commission from exercising its powers when notice of a purported manifest injustice is brought to its attention either by a party or a third party. *Banzhaf v. Carnation Co.*, 104 Idaho 700, 662 P.2d 1144 (1983).

#### **Party.**

The term "party" refers only to those persons who were parties to the original agreement or proceedings giving rise to the original award, and where the public employees' retirement system was not a party to the original compensation agreement, the retirement system lacked standing to seek modification of the prior compensation agreement. *Adams v. Bingham County Sheriff's Office*, 100 Idaho 490, 600 P.2d 1146 (1979).

#### **Retention of Jurisdiction.**

In a situation where the claimant's impairment is progressive and, therefore, cannot

adequately be determined for purposes of establishing a permanent disability rating, it is entirely appropriate for the Industrial Commission to retain jurisdiction until such time as the claimant's condition is nonprogressive. *Reynolds v. Browning Ferris Indus.*, 113 Idaho 965, 751 P.2d 113 (1988).

Even though the Industrial Commission's order contained a detailed analysis of all factors necessary for a determination of entitlement to temporary total disability benefits, but did not expressly grant claimant's request for those income benefits, the order was not considered to be equivalent to an order denying benefits as such a construction would be contrary to both the spirit and intent of the Workers' Compensation Act and would be inconsistent with the commission's clear and unambiguous order reserving or retaining jurisdiction on the issue of future changes in claimant's condition. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 795 P.2d 309 (1990).

#### **Review or Rehearing.**

Where the industrial commission retained jurisdiction of a 1977 order pursuant to subsection (3) of this section, it was within the commission's discretion to refuse to apply the doctrine of collateral estoppel against the employer in 1979 where the industrial special indemnity fund failed to show that it was using the doctrine defensively or that the employer had litigated the relevant issue with vigor in the action resulting in the prior judgment. *Shea v. Bader*, 102 Idaho 697, 638 P.2d 894 (1981), modified on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Where the claimant's motion to reopen his claim was supported by his attorney's affidavit stating that the attorney had entered into the stipulation which formed the basis of the original dismissal of the claim because of a misunderstanding with the claimant, and because of this unauthorized stipulation the claimant was denied his right to a hearing before the commission, the commission did not err in granting the claimant's motion to reopen his claim to prevent a manifest injustice. *Iverson v. Farming*, 103 Idaho 527, 650 P.2d 669 (1982).

#### **Settlement.**

##### **—With Employer.**

Employee's claim against Industrial Special Indemnity Fund for benefits attributable to a pre-existing physical impairment was not precluded by an earlier settlement agreement between employee and his employer. *Tagg v. State, Indus. Special Indem. Fund*, 123 Idaho 95, 844 P.2d 1345 (1993).

#### **Sufficiency of Evidence.**

Where worker wanted modification of compensation agreement, and where agreement

blurred the distinction between impairment and disability, commission did not err in refusing to reopen the case concerning worker's previous injury; worker had no basis to establish different percentage figures for impairment and disability since there was no evidence that the degree of impairment in 1979 was greater than 20%, since worker's hip was relatively asymptomatic after the 1979 surgery, and since the record was silent as to any nonmedical factors, following the 1979 surgery, that could have caused the disability rating to deviate from the medically determined degree of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

Although claimant presented ample evidence documenting his service record, the court deferred to the Industrial Commission's finding that he failed to meet his burden of producing evidence in support of his contention that his 1985 injury prevented him from rejoining the Army National Guard. *Matthews v. Department of Cors.*, 121 Idaho 680, 827 P.2d 693 (1992).

Where the Industrial Commission determined that claimant had not met his burden of showing that any change in the condition of his back was related to his industrial accident of March 1985, but more than likely was related to either an alleged industrial accident of March 1988 or an occasion in January 1989 when claimant moved several heavy objects during a fire in his home, there was ample evidence in the record to support these findings by the commission. *Matthews v. Department of Cors.*, 121 Idaho 680, 827 P.2d 693 (1992).

#### **Time for Application.**

A compensation agreement between a workmen's compensation claimant and the State Insurance Fund which clearly provided for an award of disability, and which was approved by the Industrial Commission, became an "award" which, under §§ 72-711 and 72-718 was final and conclusive as to claim-

ant's disability; modifications to the agreement were governed by this section and the agreement could not be modified because claimant's application for modification was not filed within 5 years of the date of the injury, even though the application was filed within one year of payment of medical benefits. *Fowler v. City of Rexburg*, 116 Idaho 1, 773 P.2d 269 (1988).

Petition by employer for rehearing and modifications was properly filed where employer initially filed a motion for rehearing alleging lack of substantial evidence to support the initial award of the Industrial Commission, and further alleging error of law, and where thereafter employer filed a supplemental petition for rehearing and petition for modification of the original award, alleging fraud and manifest injustice; employer's petition for rehearing and modification on the basis of manifest injustice need not have been filed until six months following the initial decision of the commission, since it is clear that subsection (3) of this section permits the commission to review a case at any time within five years of the date of the accident. *Frank v. Bunker Hill Co.*, 117 Idaho 790, 792 P.2d 815 (1988).

**Cited in:** *Lampe v. Zamzow's, Inc.*, 102 Idaho 126, 626 P.2d 782 (1981); *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983); *Fenich v. Boise Elks Lodge No. 310*, 106 Idaho 550, 682 P.2d 91 (1984); *Gaither v. EG & G Idaho, Inc.*, 106 Idaho 675, 682 P.2d 628 (1984); *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984); *Walker v. Hensley Trucking*, 107 Idaho 572, 691 P.2d 1187 (1984); *Waltman v. Associated Food Stores, Inc.*, 109 Idaho 273, 707 P.2d 384 (1985); *Wright v. Willer*, 111 Idaho 474, 725 P.2d 179 (1986); *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987); *Armbrister v. Hanny Custom Farming*, 123 Idaho 31, 844 P.2d 13 (1992); *Edwards v. Harold L. Harris Constr.*, 124 Idaho 59, 856 P.2d 96 (1993); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

### **DECISIONS UNDER PRIOR LAW**

#### **ANALYSIS**

After agreement or compromise settlement.  
 Burden of proof.  
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 —Inquiry limited.  
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Successive injuries.  
Sufficiency of evidence.  
Temporary allowances.  
Time for application.

### **After Agreement or Compromise Settlement.**

An agreement entered into between the parties and approved by the industrial accident board was *res judicata*, and in the absence of a change in conditions, the board might not, on an application thereafter, hear the matter *de novo*, neither might it vacate or otherwise modify an award in the absence of a change in conditions. *Zapantis v. Central Idaho Mining & Milling Co.*, 61 Idaho 660, 106 P.2d 113 (1940).

The compromise settlement of a claim did not preclude the claimant from seeking modification of such settlement upon the happening of a second accident to the disability from which the first accident was claimed to have contributed. *Dawson v. Hartwick*, 91 Idaho 561, 428 P.2d 480 (1967).

### **Burden of Proof.**

Where the state insurance fund or other insurance carrier recognized a hernia as compensable and paid therefor until it was evidently considered that the employee had recovered from the operation, this was not such an acknowledgment of liability for, or recognition of, the subsequent condition of the employee as having arisen from or having been caused by the operation for the hernia, as to cast upon the insurance carrier the burden of proving that it was entitled to cease payments. *Carlson v. F. H. DeAtley & Co.*, 55 Idaho 713, 46 P.2d 1089 (1935).

Where an application was made for a modification of an award, the burden was on the moving party to show a change in condition. *Boshers v. Payne*, 58 Idaho 109, 70 P.2d 391 (1937).

The burden of proof rested on the party who sought an order by the industrial accident board declaring a change in conditions arising from an injury sustained by the claimant, and where there was no change in condition, the board could not rehear a case on its merits and determine under the evidence that the claimant was totally disabled, and had been since his injury, and make an award increasing his weekly compensation. *Fackenthall v. Eggers Pole & Supply Co.*, 62 Idaho 46, 108 P.2d 300 (1940).

The burden was on a party claiming a change of conditions to prove the change and that such change was due to a prior compensable accident, so where a claimant had been awarded total temporary disability compensation for electrical burns, to entitle the claimant to additional compensation on

the ground of a subsequent change in condition, the burden was upon the claimant to prove by a preponderance of the evidence that the shock caused his alleged changed condition. *Howard v. Washington Water Power Co.*, 65 Idaho 339, 144 P.2d 210 (1943).

### **Change in Condition.**

On petition of defendants, cessation of payments was approved upon showing that claimant's total disability for work had changed to partial with use of corrective glasses, but claimant was held entitled to specific indemnity for physical impairment determined without use of corrective glasses. *Kelley v. Prouty*, 54 Idaho 225, 30 P.2d 769 (1934).

Question whether an injury in a second accident was a recurrence of a prior compensated injury was one of proximate cause. If condition on second injury was proximately caused by first accident, first employer is liable, but claimant should proceed under the statute. *Patrick v. Smith Baking Co.*, 64 Idaho 190, 129 P.2d 651 (1942).

The test of a "change of condition" was a disability variably continuing, progressively healing or eventually ceasing, not being a fixed definite loss subject to specific indemnity. *Mahoney v. Payette*, 64 Idaho 443, 133 P.2d 927 (1943).

When the industrial accident board refrained from determining the amount of claimant's permanent physical impairment until his condition should become fixed, definite and determinable even when said board found disability had increased since making the compensation agreement, such claimant was entitled to an award based upon his changed physical impairment. *McCall v. Potlatch Forests, Inc.*, 67 Idaho 415, 182 P.2d 156 (1947).

Where appellant after injury was unable to perform the duties of a logger but for two years past had driven a gravel truck, he was not totally disabled. *McCall v. Potlatch Forests, Inc.*, 67 Idaho 415, 182 P.2d 156 (1947).

Where board at original hearing found claimant had suffered disability equivalent to 50 per cent of loss of arm at the shoulder, and on rehearing there was evidence that permanent partial disability was no greater, this was not conclusive on question as to whether claimant had a recurrence which would entitle him to further relief under the act. *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949).

Board erred in dismissing claimant's peti-

tion for further medical treatment, where evidence showed that change in applicant's condition required further medical treatment. *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949).

Where claimant filed a petition on January 5, 1948 for modification of award on ground that disability was increasing, board did not err in setting petition for hearing on February 3, 1950, since board could not indefinitely postpone hearing. *Egus v. Triumph Mining Co.*, 71 Idaho 354, 232 P.2d 136 (1951).

Where employer entered into an agreement for payment of total temporary disability for loss of time and for payment of permanent partial disability for loss of leg such agreement was equivalent to factual finding of the board and was final and conclusive, but it did not bar the board in subsequent modification proceeding from finding total permanent disability or finding a greater degree of permanent partial disability based on changed conditions. *Nitkey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 73 Idaho 294, 251 P.2d 216 (1952).

Board properly denied further compensation to petitioner against employer and its carrier where there was no change in condition of petitioner, and no attempt to set aside prior compensation agreement or to claim compensation from employer. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

The industrial accident board properly ruled that the limitation period for the making of an application for an award on the ground of change of conditions, was not applicable because in this case no agreement or award had been made or entered. *Lindskog v. Rosebud Mines, Inc.*, 84 Idaho 160, 369 P.2d 580 (1962).

It was the change as to the disability of the injured employee which authorized the modification of an award or agreement. The attendance was required to be furnished "immediately after an injury, and for a reasonable time thereafter." *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

It was proper for board to treat petitions for rehearing after award by whole board as a petition for modification based on a change in condition, despite denial by claimant of such a change, where claimant's petitions alleged a change in condition and did not allege that board failed to make its finding based on all the evidence available at the time, and where later petition was filed more than six months after the original award. *Scott v. Aslett Constr. Co.*, 92 Idaho 834, 452 P.2d 61 (1969), overruled on other grounds, *Christensen v. Callvo Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

Modification of an award may have been made on the basis of a change in condition

although the claimant was not gainfully employed at the time he underwent the change in condition. *Johnson v. Boise Cascade Corp.*, 93 Idaho 107, 456 P.2d 751 (1969).

Finding of industrial accident board that claimant's back injury of December 4, 1968, while employed by last employer, was an aggravation of a previous back injury of February 14, 1968, while working for previous employer, was upheld where the compensation agreement between previous employer and claimant was by its terms subject to the statute and where there was substantial, though conflicting, evidence to support the board's findings. *Earl v. Swift & Co.*, 93 Idaho 546, 467 P.2d 589 (1970).

#### —Inquiry Limited.

A mistake entering into an agreement between the parties for compensation, which was approved by the industrial accident board, may not have been modified or corrected thereafter, since the statute only authorized the modification on the showing of a change in condition. *Reagan v. Baxter Foundry & Mach. Works*, 53 Idaho 722, 27 P.2d 62 (1933).

On application for an increased award, the board was restricted to a consideration of conditions arising after the former award. *Mell v. Larson*, 54 Idaho 754, 36 P.2d 250 (1934).

From a careful survey of the authorities, it was apparent that a hearing on changed conditions was limited to a modification of the award solely on that ground, and no other errors might be corrected in the instance of either party. *Barry v. Peterson Motor Co.*, 55 Idaho 702, 46 P.2d 77 (1935).

Application might not serve the purpose of an appeal, by presenting errors in original determination, but only presented question of modification by reason of a change in condition. *Boshers v. Payne*, 58 Idaho 109, 70 P.2d 391 (1937).

Whether letter of claimant with amendment by his attorney was sufficient to constitute an application for further compensation was not passed upon on appeal, if no appeal was taken from affirmative ruling of the board. *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949).

#### Constitutionality.

The contention that the section relating modification of awards and agreements was unconstitutional in that it was a special law, prohibited by art. 3, § 19 of the state constitution was incorrect as the section was general in terms, all persons subject to it were treated alike as to privileges, protection, and in every other respect. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

The provisions limiting the making of an application to four years, but not oftener than



once in six months did not limit the remedy so given to any single person or group of persons, therefore it was not unconstitutional as making any classification whatsoever. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

Any defects or imperfections in the statute as originally enacted in 1917, if any there were, in allowing an injured employee to recover compensation and recoupment for medical expenses after four years, would be cured by the reenactment thereof in 1931 and would be sufficient to negative any contentions that such section was invalid. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

#### **Death after Award.**

Death of claimant after award, while a change of conditions, did not justify cessation of accruing payments to his representative. *Haugse v. Sommers Bros. Mfg. Co.*, 43 Idaho 450, 254 P. 212 (1927).

#### **Dismissal of Petition.**

If petitioner for modification failed to appear the board could dismiss without the necessity of making a finding of facts. *Egus v. Triumph Mining Co.*, 71 Idaho 354, 232 P.2d 136 (1951).

#### **Effect of Original Award.**

Award as to degree of injury was not final. *Hustead v. H. E. Brown Timber Co.*, 52 Idaho 590, 17 P.2d 927 (1932). But hearing hereunder restricted to change of condition arising after former award. *Mell v. Larson*, 54 Idaho 754, 36 P.2d 250 (1934); *Zapantis v. Central Idaho Mining & Milling Co.*, 61 Idaho 660, 106 P.2d 113 (1940). And no other errors may be corrected by either party. *Barry v. Peterson Motor Co.*, 55 Idaho 702, 46 P.2d 77 (1935).

An agreement between the parties, approved by the industrial accident board, constituted an award by the board and was subject to modification on changed conditions, the same as any other award. *Reagan v. Baxter Foundry & Mach. Works*, 53 Idaho 722, 27 P.2d 62 (1933).

An agreement entered into between the parties and approved by the industrial accident board was *res judicata*, and in the absence of a change in conditions, the board might not, on an application thereafter, hear the matter *de novo*, neither might it vacate or otherwise modify an award in the absence of a change in conditions. *Zapantis v. Central Idaho Mining & Milling Co.*, 61 Idaho 660, 106 P.2d 113 (1940).

An appeal laid from an award predicated upon an agreement between the claimant, the employer and his insurance carrier, and which was approved by the industrial accident board; it had all of the incidents of an award made on a contested hearing, in the

absence of fraud; it might be reviewed or it might be modified on the ground of a change in conditions. *Zapantis v. Central Idaho Mining & Milling Co.*, 61 Idaho 660, 106 P.2d 113 (1940).

Agreements between claimant and employer had effect of an award except on application for modification "on the ground of a change of conditions," the board might end, diminish or increase the award. *Skelly v. Sunshine Mining Co.*, 62 Idaho 192, 109 P.2d 622 (1941).

While the furnishing to the injured employee of medical, surgical, or hospital services and other attendance or treatment might be treated as payment of compensation, such was not the subject of an agreement or an award which was contemplated by the statute, as being subject to modification on the ground of a change in conditions. *Clevenger v. Potlatch Forests, Inc.*, 85 Idaho 193, 377 P.2d 794 (1963).

#### **Finality of Award.**

Absent fraud, an award by the board was final and conclusive, unless modification was sought or an appeal taken. *Nitkey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 73 Idaho 294, 251 P.2d 216 (1952).

A lump settlement made pursuant to the section relating to lump sum payments was final and could not be reopened within four years after the accident. *Limprecht v. Bybee*, 76 Idaho 293, 281 P.2d 1047 (1955).

The four-year limitation period did not apply to cases requiring medical attention and cases of total and permanent disability. *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 (1956).

#### **Fraud.**

Application for change or modification of award had to allege and prove fraud in inception or change in condition warranting such change or modification. *Rodius v. Coeur d'Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

Conceding, without deciding, that board had power, in case of fraud, to vacate its approval of an agreement, application therefor should have set forth allegations of fraud. *Rodius v. Coeur d'Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

Award from which no appeal prosecuted was *res judicata* as to claimant's then condition and rights and on subsequent hearing on modification errors in original award did not constitute fraud in law. *Bower v. Smith*, 63 Idaho 128, 118 P.2d 737 (1941); *Pruett v. Cranston Chevrolet Co.*, 63 Idaho 478, 121 P.2d 559 (1941).

Error in ascertainment of compensation did not constitute fraud. *Zapantis v. Central Idaho Mining & Milling Co.*, 64 Idaho 498, 136 P.2d 154 (1943).

#### **In General.**

This section contemplates a bar to claims for compensation except those based on nec-

essary medical payments claims which are made within a reasonable time of the injury. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

### **Lump Sum Settlement.**

A "change of condition" was not a sufficient ground for setting aside a lump sum settlement since the effect of the statute providing for lump sum payments was to make a lump sum settlement final and not subject to review. *Fountain v. T.Y. & Jim Hom*, 92 Idaho 928, 453 P.2d 577 (1969).

### **Place of Hearing.**

Board did not err in setting hearing for modification in county other than that in which accident occurred, where parties by stipulation in original proceeding agreed that case could be set in another county. *Egus v. Triumph Mining Co.*, 71 Idaho 354, 232 P.2d 136 (1951).

### **Review or Rehearing.**

Although not provided for by statute, a full rehearing by the whole board, after an award by the whole board, was warranted where the parties failed to produce satisfactory evidence upon any question of fact material and necessary to the decision of the case. *Scott v. Aslett Constr. Co.*, 92 Idaho 834, 452 P.2d 61 (1969), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

### **Successive Injuries.**

Where a claimant was compensated for an injury to his elbow, but subsequently reinjured the elbow and contracted degenerative arthritis requiring corrective surgery, this section did not bar compensation for medical and surgical expenses despite a lapse of four years and 10 months between the first injury and notice to the employer of the second compensation claim. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

Where a claimant was compensated for a back injury but experienced increasing pain and requested compensation for corrective surgery more than five years after the accident, this section would not bar his recovery of compensation for medical and surgical expenses. *Steinebach v. Hoff Lumber Co.*, 98 Idaho 428, 566 P.2d 377 (1977).

### **Sufficiency of Evidence.**

Evidence that minor child of deceased employee was illegitimate did not show change of condition or fraud sufficient to justify board in ending, diminishing or increasing compensation to such child. *Rodius v. Coeur d'Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

A claim based on sacroiliac sprain, conceded to be a total and permanent injury, but resisted on the ground that an award for tem-

porary disability was res judicata, was upheld upon the ground of changed condition. *Hustead v. H. E. Brown Timber Co.*, 52 Idaho 590, 17 P.2d 927 (1932).

Evidence was sufficient to sustain a finding that the osteoarthritis, from which the employee was suffering since an award, was due entirely to disease. *Mell v. Larson*, 54 Idaho 754, 36 P.2d 250 (1934).

Evidence supported the finding to the effect that the injured employee did not develop traumatic neurosis or psychosis because of injury. *Mell v. Larson*, 54 Idaho 754, 36 P.2d 250 (1934).

Where the sole question for determination was whether or not there was sufficient evidence in the record on appeal to sustain the board's findings and conclusions, that an employee's present disability did not result from a hernia or operation therefor, the appellate court might look only to the testimony of the second hearing where the employer or insurance carrier offered the testimony taken at the first hearing but which was excluded by the board upon the employee's objection. *Carlson v. F. H. DeAtley & Co.*, 55 Idaho 713, 46 P.2d 1089 (1935).

Where there was sufficient evidence to support a finding as to change in condition from partial disability to total disability, an award of additional compensation might be properly entered. *McGarrigle v. Grangeville Elec. Light & Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939).

The Supreme Court would not disturb an order of the industrial accident board dismissing an application for modification of a compensation agreement where the order was supported by substantial competent evidence. *Pruett v. Cranston Chevrolet Co.*, 63 Idaho 478, 121 P.2d 559 (1941).

An order of the industrial accident board which postponed making an award to an injured workman until the happening of an event or the bringing about of a condition which might or might not occur or be brought about in his lifetime, was of such finality as to be subject to review on appeal. *McCall v. Potlatch Forests, Inc.*, 67 Idaho 415, 182 P.2d 156 (1947).

Where there was any competent and substantial evidence to support the board's findings, the findings would not be disturbed on appeal. *Stralovich v. Sunshine Mining Co.*, 68 Idaho 574, 201 P.2d 106 (1948).

### **Temporary Allowances.**

Where the industrial commission had not made the final award, but had only made temporary allowances, there being no final award to be modified, law providing time limitation in which applications for review of awards were to be filed was not applicable. *Brooks v. Duncan*, 96 Idaho 579, 532 P.2d 921 (1975).



### Time for Application.

Where final payment of award was received about August 8 and claimant on October 19 filed petition to reopen award on ground that he was then suffering from a traumatic psychosis, commission had not lost jurisdiction, and right to apply for readjustment had not then expired. *Jenkins v. Boise Payette Lumber Co.*, 49 Idaho 24, 287 P. 202 (1930).

The statute limiting the time for filing an application to within four years of the date of the accident causing the injury complained of was not retroactive. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

While the board might have erred in making an award of permanent partial disability instead of permanent total disability, claimant should have appealed, and a subsequent application more than four years after the accident for modification of the award was too late. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

Where claimant filed petition for modification of award within four-year period, board did not err in setting hearing on petition for hearing filed by employer more than four years after accident, since petition for hearing was not an original petition to review award. *Egus v. Triumph Mining Co.*, 71 Idaho 354, 232 P.2d 136 (1951).

The board could review any award within four years from date of accident on application by any party based on change of condi-

tions. *Nitkey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 73 Idaho 294, 251 P.2d 216 (1952).

Provision in compensation agreement that it was subject to modification applied as long as instalments were paid under the agreement, but it did not apply after a lump settlement was made and approved under the statute relating to lump sum payments. *Limprecht v. Bybee*, 76 Idaho 293, 281 P.2d 1047 (1955).

Claim against second injury fund was timely where letter mailed to board seeking additional compensation was received within four years of date of accident though amended petition was not filed within four-year period, since petition reverted back to date of filing of original letter. *Anderson v. Potlatch Forests, Inc.*, 77 Idaho 263, 291 P.2d 859 (1955).

While statutes providing for time and manner for relief on claims and modifications of awards and agreements by reference in the section relating to filing of claims made a part of the Firemen's Retirement Act, the board did not rule that either section of such statutes would bar widow's claim that should not come into existence until death of employee and she had perfected her pending appeal within the time limit specified. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957); *Zimmerman v. Harris Lumber Co.*, 82 Idaho 187, 350 P.2d 746 (1960).

**72-720. Powers of commission — Safety.** — (1) Except as provided in subsection (2) of this section, whenever it receives a written request for an inspection or has written documented information that any employer subject to the commission's jurisdiction in worker safety matters is employing workers in or about any structure, room or place of employment which is not constructed and maintained in conformity with reasonable standards of construction as shall render it safe, or is employing workers on, or with, tools, equipment or machinery which are not equipped with safety devices, safeguards or other means of protection well adapted to render employees and places of employment safe, the commission is authorized to inspect such places of employment, to compel such employer to cease employing workers in such places, or on, or with, such tools, appliances or machinery, if they are deemed unsafe, and, pursuant to the provisions of chapter 52, title 67, Idaho Code, to adopt reasonable minimum safety standards.

(2) The provisions of this section requiring a written request or written documentation prior to an inspection shall not apply to:

(a) Inspections conducted pursuant to rules promulgated by the commission relating to the logging safety program, boilers and pressure vessels; or

(b) Inspections of buildings owned or maintained by a political subdivision of the state if such political subdivision has not, pursuant to chapter 41, title 39, Idaho Code, adopted applicable building codes and instituted and implemented a code enforcement program; provided however, that

inspections by the commission of such buildings shall be conducted on an annual basis only. For purposes of this subsection, "political subdivision" means any governmental unit or special district of the state of Idaho. [I.C., § 72-720, as added by 1971, ch. 124, § 3, p. 422; am. 1974, ch. 70, § 2, p. 1151; am. 2002, ch. 126, § 3, p. 352; am. 2004, ch. 359, § 3, p. 1067.]

### STATUTORY NOTES

**Cross References.** — State insurance manager and his designated inspectors authorized to inspect plants of employers insured in state insurance fund, § 72-925.

### JUDICIAL DECISIONS

#### Logging Code.

The Logging Code is designed, (1) to insure adequate safety at any place of any employment; and (2) to protect the life and safety of

employees. *Ek v. Herrington*, 738 F. Supp. 357 (D. Idaho 1990), *aff'd*, 939 F.2d 839 (9th Cir. 1991).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Duty of inspection.  
Persons not employees.

#### Duty of Inspection.

Refusal of the board to make requested investigation of the working conditions in claimant's place of employment was not error where the record showed a periodic examination of the premises by a health engineer in Idaho's department of public health over some 10 years prior to the occurrence of claimant's affliction and that no other workman in the area where claimant worked suffered any affliction of his teeth or gums as claimed by claimant. *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).

#### Persons Not Employees.

Where a supervising architect for a school district was injured while making an inspection of the work, he was not an employee of the contractor and, therefore, not covered by the Workmen's Compensation Law defining a workman and by its provisions for the adoption of minimum safety standards for the protection of employee workmen. *Pehrson v. C.B. Lauch Constr. Co.*, 237 F.2d 269 (9th Cir. 1956).

**72-721. Rules for safety — Protective appliances.** — The commission is empowered to require all employers to adopt rules which have been approved by it for the protection and safety of employees and for preventing the contraction of occupational diseases; to require all employers to keep such rules posted in conspicuous places in and about the premises; and to require employers to install, use or adopt such protective or safety appliances as the commission may deem necessary for the protection of the employees. [I.C., § 72-721, as added by 1971, ch. 124, § 3, p. 422.]

**72-722. Unsafe conditions — Procedure — Warning order — Safety inspection — Hearing — Decision.** — (1) The commission is empowered, whenever it has information that employees are employed in or about places, or on, or with, tools, equipment or machinery which are not constructed or equipped to properly protect life, health and safety of the employees, or which do not conform to minimum safety standards adopted by the commission, to immediately notify, by United States mail, the owner or lessee of the premises or the proprietor or operator of the business there



carried on, of the fact that it has such information and to require such owner, lessee, proprietor or operator to immediately render such places of employment safe, or to equip with proper safety devices, safeguards or other means or methods of protection, such tools, equipment or machines so as to render his employees and the place of employment safe, or to cease employing workmen in or about such places or on or about such tools, equipment or machinery.

(2) Upon receiving such notice from the commission, such owner, lessee, proprietor or operator shall immediately conform to the order of the commission or shall notify the commission that he claims he is not operating in violation of such order.

(3) Upon receiving such information from such owner, lessee, proprietor or operator, the commission shall, unless such information was obtained by inspection by the commission, inspect or cause to be inspected, said place of employment or tools, equipment or machinery, and if upon such inspection the commission is of the opinion that the place of employment is not unsafe or that the tools, equipment or machinery have proper safety devices, safeguards or other means or methods of protection which are well adapted to render the employees and places of employment safe, it shall so notify the owner.

(4) If after such inspection the commission is of the opinion that the place of employment is not constructed or maintained to render it reasonably safe or that the tools, equipment or machines are not equipped with proper safety devices, safeguards or other means or methods of protection which are well adapted to render the employees and places of employment safe, it shall designate a time and place for hearing and may assign the matter for hearing by a member of the commission, or a hearing officer, referee or examiner.

(5) The commission or the officer to whom the matter is assigned for hearing shall make such inquiry and investigation as shall be deemed necessary. The hearing may be held in the city or town within the county where such places of employment are situated or such other place as the commission deems most convenient for the parties and most appropriate for ascertaining their rights.

(6) Thereafter, the applicable procedure shall be as set forth in sections 72-714 to 72-718, inclusive. [I.C., § 72-722, as added by 1971, ch. 124, § 3, p. 422.]

**72-723. Violation of safety order a misdemeanor.** — Every employer, employee or other person who, either individually or acting as an officer, agent or employee of a corporation or other person, violates any decision or order of the commission made after the hearing provided in the foregoing section, or who shall fail or refuse to comply with such order, or part thereof, or who, directly or indirectly, knowingly induces another to do so, is guilty of a misdemeanor.

Every such person shall also be liable to a penalty of one dollar (\$1.00) for each employee for every day during which such failure continues, to be recovered in an action brought by the commission in the name of the state

of Idaho, and the amount so collected shall be paid into the industrial administration fund, and for this purpose the district court in the county in which such employer carries on any part of his trade or occupation shall have jurisdiction.

If any employer shall fail for a period of ten (10) days to comply with such order of the commission, he may be enjoined by such district court from carrying on such trade or occupation while such failure continues.

All proceedings in the courts under this section shall be brought by the commission in the name of the state of Idaho. [I.C., § 72-723, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Cross References.** — Attorney general, legal representative of commission on request, § 72-518.

### JUDICIAL DECISIONS

#### Claim Not Barred.

There was substantial competent evidence to support the Industrial Commission's finding that prior to the expiration of the five-year time period for filing an application for a workers' compensation hearing, the claimant and the employer, as well as the claimant and the employer's heirs, became engaged in con-

sultations and negotiations concerning a claim, that these negotiations may have possibly led claimant to believe that no decision had been made by the employer and therefore it was not necessary to file an application for hearing, and that claimant's claim was not time barred. *Swenson v. Estate of Craner*, 117 Idaho 57, 785 P.2d 621 (1990).

**72-724. Appeal to Supreme Court.** — An appeal may be made to the Supreme Court by such parties from such decisions and orders of the commission and within such times and in such manner as prescribed by Rule of the Supreme Court. [I.C., § 72-724, as added by 1977, ch. 300, § 4, p. 838.]

### STATUTORY NOTES

**Cross References.** — Jurisdiction of Supreme Court, § 72-732.

**Prior Laws.** — Former § 72-724 which

comprised I.C., § 72-724, as added by 1971, ch. 124, § 3, p. 422 was repealed by S.L. 1977, ch. 300, § 3.

### JUDICIAL DECISIONS

#### ANALYSIS

Determination of facts.  
Finality of order.  
Order denying motion to compel discovery.  
Scope of review.  
Substantial evidence.  
Untimely notice of accident.

#### Determination of Facts.

The determination of whether or not the claimant falls within the "odd-lot" classification is a factual one; such a determination of fact by the commission can be set aside only if not based on substantial competent evidence.

*Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 619 P.2d 1152 (1980).

#### Finality of Order.

Referee's order denying motion to compel discovery was not a final decision of the Com-



mission; therefore, there was no right to appeal from the referee's order. *Peterson v. Farmore Pump & Irrigation*, 119 Idaho 969, 812 P.2d 276 (1991).

Claimant could not appeal referee's denial of his request to reopen his workers' compensation case because the Industrial Commission did not approve and confirm the denial; order was not appealable because it was not an order of the Commission, but only of the referee. Section 72-718 provides a procedure by which a party may seek a ruling by the Commission on a matter decided by a referee that was not confirmed or approved by the Commission in its approval, confirmation, and adoption of the referee's findings and conclusions. *Wheaton v. Industrial Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

The commission did not adopt, approve, or confirm the referee's ruling on the admissibility of the testimony of the witness. The Findings of Fact, Conclusions of Law, and Proposed Order contained no reference to the referee's decision regarding the testimony of the witness, nor did the record indicate that the plaintiff sought, at any time, to bring the ruling to the Commission's attention, either by filing a motion to reconsider or by arguing the issue in a post-hearing briefing. In this case, the Commission did not specifically approve or adopt the referee's ruling, and it was not a final appealable order pursuant to I.A.R. 11(d). *Dehlbom v. State, Indus. Special Indem. Fund*, 129 Idaho 579, 930 P.2d 1021 (1997).

### **Order Denying Motion to Compel Discovery.**

Idaho Appellate Rule 17(e)(1)(A) might be construed to allow the Supreme Court to consider a referee's order denying a motion to compel discovery; to do so, however, would expand the statutory right of appeal specified by the legislature in this section to include orders that were not orders of the Commission, and is beyond the court's authority to do so. *Peterson v. Farmore Pump & Irrigation*, 119 Idaho 969, 812 P.2d 276 (1991).

### **Scope of Review.**

Findings of fact made by the Industrial Commission are subject to limited appellate review; the court's function is to determine whether the findings are supported by substantial, competent evidence. *Lopez v. Amalgamated Sugar Co.*, 107 Idaho 590, 691 P.2d 1205 (1984).

Regardless of whether witnesses have personally appeared before the Industrial Commission, the Supreme Court's review is restricted to determining whether findings of fact by the Industrial Commission are sup-

ported by substantial competent evidence. *Nigherbon v. Ralph E. Feller Trucking, Inc.*, 109 Idaho 233, 706 P.2d 1344 (1985).

### **Substantial Evidence.**

Where an orthopedic surgeon gave expert medical testimony that based on his examination of the claimant and the results of an arthroscopy exam of the claimant's knee, it was his opinion that the claimant had a permanent physical impairment equivalent to ten percent as compared to the loss of the leg at the hip, but that the disability should not prevent the claimant from returning to his former vocation as a diesel mechanic, such testimony constituted substantial competent evidence supporting the commission's finding of fact that the claimant suffered a permanent partial disability of ten percent loss of the leg at the hip. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

### **Untimely Notice of Accident.**

The commission's finding that claimant failed to give timely notice of his accident to the employer was correct, where the record indicated that the employer did not learn that claimant was claiming a work-related accident until some time after June 7, approximately four months after the date of the accident, and where prior to that time claimant had not filed an accident report with his employer, even though his position as warehouse foreman required him to participate in and become familiar with the plant's safety program, including its policy of reporting every accident regardless of how minor it might be. *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979).

**Cited in:** *Francis v. Amalgamated Sugar Co.*, 98 Idaho 407, 565 P.2d 1364 (1977); *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979); *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980); *George v. American Smelting & Ref. Co.*, 101 Idaho 781, 621 P.2d 397 (1980); *Roper v. Guerdon Indus., Inc.*, 102 Idaho 19, 624 P.2d 401 (1981); *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981); *Knapp v. Brotherton's, Inc.*, 102 Idaho 403, 630 P.2d 690 (1981); *Gordon v. West*, 103 Idaho 100, 645 P.2d 334 (1982); *Graham v. Larry Donohoe Logging*, 103 Idaho 824, 654 P.2d 1377 (1982); *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983); *Monroe v. Chapman*, 105 Idaho 269, 668 P.2d 1000 (1983); *Malueg v. Pierson Enters.*, 111 Idaho 789, 727 P.2d 1217 (1986); *Cox v. Denny's Restaurants*, 112 Idaho 321, 732 P.2d 290 (1987); *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989); *Haffaker v. Red Lion Motor Inn-Riverside*, 122 Idaho 464, 835 P.2d 1275 (1992).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Appeal direct from board.  
Appeal or review.  
Commencement of time for appeal.  
Compensation agreement, effect.  
Conclusiveness of finding.  
Constitutionality.  
Effect of award.  
Effect of board's findings.  
Findings of board.  
Questions before court on appeal.  
Questions of law.  
State law applicable.  
Substantial evidence.

**Appeal Direct from Board.**

Under the constitutional amendment and cognate legislation, in respect to the same such matter, appeals from an order of the industrial accident board lie directly to the Supreme Court, instead of to the district court as theretofore. *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 74 P.2d 171 (1937).

**Appeal or Review.**

The decision of the industrial accident board was final, from which an appeal lay to the Supreme Court (formerly district court) and which had to be taken within 30 days after a copy thereof had been sent to the parties, and there was no provision of the law requiring a petition for review where the matter was heard before the whole board and not a member thereof. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

Though evidence before the board was such that reasonable minds might differ upon the issue presented, if there was evidence of a substantial nature which supported decision of the board, the decision would not be reversed on appeal. *Johansen v. Ferry-Morse Seed Co.*, 69 Idaho 275, 206 P.2d 545 (1949).

Where employer entered into an agreement for payment of total temporary disability for loss of time and for payment of permanent partial disability for loss of leg such agreement was equivalent to factual finding of the board and was final and conclusive, but it did not bar the board in subsequent modification proceeding from finding total permanent disability or finding a greater degree of permanent partial disability based on changed conditions. *Nitkey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 73 Idaho 294, 251 P.2d 216 (1952).

Supreme Court in reviewing action of industrial accident board would only determine whether findings of board were supported by competent and substantial evidence. *Smith v. Potlatch Forests, Inc.*, 74 Idaho 470, 264 P.2d 684 (1953); *Yanzick v. Sunset Minerals, Inc.*, 75 Idaho 384, 272 P.2d 696 (1954).

Workmen's compensation board's finding as to character of employment was binding on appeal if supported by substantial and competent evidence. *Doyal v. Hoback*, 75 Idaho 431, 272 P.2d 313 (1954).

A compensation agreement and lump settlement thereon approved by the board became final and conclusive when no appeal from award was made within 30 days and employee could not thereafter attack the award on the ground of fraud. *Limprecht v. Bybee*, 76 Idaho 293, 281 P.2d 1047 (1955).

The Industrial Accident Board was the arbiter of conflicting evidence present in a claim under the Workmen's Compensation Law, and if the board's determination was supported by substantial competent evidence, it would not be disturbed on appeal. *Hamby v. J.R. Simplot Co.*, 94 Idaho 794, 498 P.2d 1267 (1972) (decision prior to 1995 amendment).

In an appeal from an Industrial Accident Board ruling the Supreme Court was limited to questions of law. *Madron v. Green Giant Co.*, 94 Idaho 747, 497 P.2d 1048 (1972).

With respect to factual findings of the board, the Supreme Court was restricted to a determination of whether the findings were supported by substantial and competent evidence. *Madron v. Green Giant Co.*, 94 Idaho 747, 497 P.2d 1048 (1972).

Findings supported by substantial evidence must stand. *Lynskey v. Lind*, 94 Idaho 788, 498 P.2d 1261 (1972).

Order of Industrial Accident Board would not be set aside where appellants failed to establish from the facts any material conflict between the record and the findings of the board and the findings were supported by substantial, competent evidence. *Clark v. Sage*, 95 Idaho 79, 502 P.2d 323 (1972).

If the findings of fact of the industrial commission are supported by substantial competent evidence, they will not be disturbed by the court on appeal. *Levesque v. Hi-Boy Meats, Inc.*, 95 Idaho 808, 520 P.2d 549 (1974); *Bills v. Rich Motor Co.*, 96 Idaho



259, 526 P.2d 1095 (1974); *Gradwohl v. J.R. Simplot Co.*, 96 Idaho 655, 534 P.2d 775 (1975); *Dean v. Dravo Corp.*, 97 Idaho 158, 540 P.2d 1337 (1975); *Nenoff v. Culligan Soft Water*, 97 Idaho 243, 542 P.2d 837 (1975).

Whether the findings of the commission are based on substantial competent evidence is a determination to be made by the court on appeal. *Gradwohl v. J.R. Simplot Co.*, 96 Idaho 655, 534 P.2d 775 (1975).

Where the commission's finding that a claimant had left his employment voluntarily without good cause was supported by substantial competent evidence, its conclusion that the claimant was ineligible for unemployment insurance benefits would not be reversed on claimant's contention that the decision was based upon improperly admitted evidence. *Nenoff v. Culligan Soft Water*, 97 Idaho 243, 542 P.2d 837 (1975).

The Supreme Court will not substitute its views of the facts for the findings of fact made by the industrial commission if the findings are supported by substantial evidence. *Troutner v. Traffic Control Co.*, 97 Idaho 525, 547 P.2d 1130 (1976).

Where certified internist testified that pre-1971 x-rays indicated the presence of nodules in claimant's lungs at the time he began working for employer in 1955 and that claimant's emphysema symptoms which developed in 1971 were caused by tuberculosis or other similar disease which would not be work induced, there was substantial evidence to support the commission's findings that claimant was not suffering from silicosis or emphysema caused by silicosis and was thus not entitled to workmen's compensation benefits. *Ellison v. Bunker Hill Co.*, 97 Idaho 694, 551 P.2d 1330 (1976).

#### **Commencement of Time for Appeal.**

Where the industrial commission issued a final order on November 13, 1973, set that order aside, conducted a rehearing, and issued a new order on January 30, 1974, the 30-day time limit for filing an appeal began to run from the November decision as the commission is without express or implied power to grant a rehearing in cases interpreting the employment security law. *Department of Emp. v. St. Alphonsus Hosp.*, 96 Idaho 470, 531 P.2d 232 (1975).

#### **Compensation Agreement, Effect.**

Compensation agreement approved by the board had the same effect as an award by the board. *Blackburn v. Olson*, 69 Idaho 428, 207 P.2d 1160 (1949); *Evans v. Continental Life & Accident Co.*, 88 Idaho 254, 398 P.2d 646 (1965).

#### **Conclusiveness of Finding.**

The finding of the board that claimant failed to prove more than a possibility that

the injury to her husband contributed to or hastened death was conclusive, the claim being based upon the asserted ground that the injury sustained in the fall aggravated preexisting infirmities and thus contributed to and hastened death which was directly due to nephritis. *Peterson v. Jerome Coop. Creamery Ass'n*, 79 Idaho 406, 319 P.2d 187 (1957).

#### **Constitutionality.**

The statute relating to appeals from board was not unconstitutional as denial of right to jury trial. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

An employer and surety, who relied upon the statute relating to preexisting infirmities to defeat a recovery of compensation for the aggravation of preexisting disease, were not prejudiced by the fact that the constitutionality of the statute was not raised before the industrial accident board and the question of constitutionality could be raised by the claimant for the first time on appeal. *Cole v. Fruitland Canning Ass'n*, 64 Idaho 505, 134 P.2d 603 (1943).

The question of constitutionality was a judicial problem that only the courts had power to decide, therefore since it was not a proper question for determination by an administrative board, it might be raised for the first time on appeal, when no prejudice would be suffered by an adverse party. *Wanke v. Ziebarth Constr. Co.*, 69 Idaho 64, 202 P.2d 384 (1948).

#### **Effect of Award.**

Agreement to pay compensation approved by board was, in effect, its award and was final and conclusive between parties. *Rodius v. Coeur d'Alene Mill Co.*, 46 Idaho 692, 271 P. 1 (1928).

Unless an appeal was timely filed, decision of the board was final, except for modification. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781 (1934); *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

An injured employee's claim for additional compensation after a cessation of payments under an alleged summary award was barred by statute of limitations in the absence of an appeal therefrom within 30 days. *Eldridge v. Idaho State Penitentiary*, 54 Idaho 213, 30 P.2d 781 (1934).

Where an award has become final by failure to appeal a hearing because of changed conditions was limited to a modification of the award solely on that ground and no errors might be corrected by either party. *Barry v. Peterson Motor Co.*, 55 Idaho 702, 46 P.2d 77 (1935).

Where the industrial accident board made an award based upon the recommendation of the medical adviser to the manager of the state insurance fund, and compensation was

paid thereunder without dissent or complaint, the board under these circumstances had jurisdiction to make an order, and where the employee knew of the nature of the order under which he received compensation, such order was not subject to an assailment on any ground of irregularity after a lapse of 20 years. *McGarrigle v. Grangeville Elec. Light & Power Co.*, 60 Idaho 690, 97 P.2d 402 (1939).

An appeal lay from an award predicated upon an agreement between the claimant, the employer and his insurance carrier, and which was approved by the industrial accident board; it had all of the incidents of an award made on a contested hearing in the absence of fraud; it might be reviewed or it might be modified on the ground of a change in conditions. *Zapantis v. Central Idaho Mining & Milling Co.*, 61 Idaho 660, 106 P.2d 113 (1940).

The Workmen's Compensation Act provision making the judgment of the district court respecting the enforcement of a workmen's compensation award final, and prohibiting appeal therefrom, could not be evaded by the indirect method of appealing from an order denying a motion to set aside the nonappealable judgment entered pursuant to the terms of the Workmen's Compensation Act and prohibiting appeal therefrom. *Haines v. State Ins. Fund*, 65 Idaho 450, 145 P.2d 833 (1944).

An award in the absence of fraud, became final, if no appeal was taken. *Blackburn v. Olson*, 69 Idaho 428, 207 P.2d 1160 (1949).

### **Effect of Board's Findings.**

Insofar as the findings of the industrial accident board reversed the determination of the examiners that claimant, a federal employee, resigned they were in error but the findings did support the conclusion that claimant resigned for good cause therefor since the final judgment or order of the lower tribunal was correct but entered upon an erroneous theory, the judgment or order would be confirmed by the appellate court upon the correct theory. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963).

While the findings of a federal employing agency that claimant resigned might be final and conclusive as to reasons for the termination of service of claimant, it was necessary to determine whether claimant was entitled to unemployment compensation benefits under Idaho law, notwithstanding the fact that he resigned his position with the agency. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963).

The findings of the federal agency as to an employee's reason for termination of service had been held final and conclusive in state

proceedings to determine entitlement of federal employees to unemployment compensation benefits; however, the findings of the federal employing agency were final and conclusive only with respect to matters enumerated in the statutes. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963).

### **Findings of Board.**

In hearings on claimant's application for full income benefits as surviving widow of employee who was killed when his semi-truck overturned, the commission did not err in its conclusion that there was a lack of substantial evidence in the record that employee's death was caused by intoxication, even though test results revealed that decedent had .117 percent blood alcohol level, where truck stop proprietors testified that employee's behavior was normal and that he did not appear to be intoxicated. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

### **Questions Before Court on Appeal.**

Order of board dismissing occupational disease claim was not before the court on review, if no appeal was taken from the order. *Dunn v. Silver Dollar Mining Co.*, 71 Idaho 398, 233 P.2d 411 (1951).

The constitutionality of a provision connected with the workmen's compensation act may properly be raised for the first time on appeal. *Brock v. City of Boise*, 95 Idaho 630, 516 P.2d 189 (1973).

### **Questions of Law.**

In an appeal from an Industrial Accident Board ruling, the Supreme Court was limited to questions of law. *Madron v. Green Giant Co.*, 94 Idaho 747, 497 P.2d 1048 (1972).

### **State Law Applicable.**

On all matters not enumerated in the federal statutes relating to determination of entitlement of a federal employee to unemployment compensation benefits, state law prevailed. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963).

### **Substantial Evidence.**

Where the claimant's deceased husband controlled a substantial portion of the method and manner of the harvest and the testimony which indicates the farmer with whom he had contracted only envisioned exercising limited control, if necessary, to ensure satisfactory results, there is no substantial, competent evidence in the record to support the industrial commission's finding that the farmer had the right to control all activities of the deceased. *Ledesma v. Bergeson*, 99 Idaho 555, 585 P.2d 965 (1978).



**72-725. Record on appeal.** — The agency's record and reporter's transcript in an appeal to the Supreme Court shall contain such portions and documents of the proceedings of the commission, and be prepared, processed and transmitted to the Supreme Court as provided by Rule of the Supreme Court. Provided, the cost of the transcript and record shall be paid for as provided by order of the industrial commission. [I.C., § 72-725, as added by 1977, ch. 300, § 5, p. 838.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-725 which comprised I.C., § 72-725 as added by 1971, ch. 124, § 3, p. 422 was repealed by S.L. 1977, ch. 300, § 3.

**72-726 — 72-730. Appeal — Notice, transcript, perfection, time of hearing — Transcript fee — Copies. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections which comprised I.C., §§ 72-726 — 72-730, as added by 1971, ch. 124, § 3, p. 422 were repealed by S.L. 1977, ch. 300, § 3.

**72-731. Stay on appeal.** — An appeal to the Supreme Court shall automatically operate as a supersedeas or stay of the award, order or decision being disputed on the appeal unless the commission shall otherwise order. [I.C., § 72-731, as added by 1971, ch. 124, § 3, p. 422.]

#### JUDICIAL DECISIONS

##### **Automatic Stay.**

Both I.A.R. 13(d) and this section provide that upon an appeal to the Supreme Court from the Industrial Commission, the award is stayed; therefore, the Commission's order de-

nying the claimant's motion to permit collection of judgment pending appeal was proper. *Neilson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984).

**72-732. Disposition of appeal — Jurisdiction of Supreme Court.** — Upon hearing the court may affirm or set aside such order or award, or may set it aside only upon any of the following grounds:

(1) The commission's findings of fact are not based on any substantial competent evidence;

(2) The commission has acted without jurisdiction or in excess of its powers;

(3) The findings of fact, order or award were procured by fraud;

(4) The findings of fact do not as a matter of law support the order or award. [I.C., § 72-732, as added by 1971, ch. 124, § 3, p. 422.]

#### JUDICIAL DECISIONS

##### ANALYSIS

Discretion of industrial commission.

Employment relationship.

Evidence.

— Accident.

— Burden.

—Causation.  
—Medical expenses.  
Findings of commission.  
Remand to commission.  
Scope of review.

### **Discretion of Industrial Commission.**

In the presence of conflicting evidence in worker's compensation proceedings, the supreme court has consistently recognized the industrial commission as the arbiter of those conflicting facts and has acknowledged that the weight to be accorded evidence is within the commission's particular province. *Olvera v. Del's Auto Body*, 118 Idaho 163, 795 P.2d 862 (1990).

### **Employment Relationship.**

Where claimant had been paid in advance by the school district, where the local coach had the right to reject the claimant as an official through the rating system, and where the claimant had no control over the scheduling of the time and place for performance of his officiating duties, claimant therefore qualified as an "employee" of the school district for purposes of the workmen's compensation statutes. *Ford v. Bonner County Sch. Dist.*, 101 Idaho 320, 612 P.2d 557 (1980).

Whether a claimant is an employee or an independent contractor is a factual determination, and the supreme court will not overturn factual findings made by the industrial commission when those findings are supported by substantial and competent evidence, even if conflicting evidence exists. *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 905 P.2d 82 (1995).

### **Evidence.**

Where claimant appealed commission finding that there was no causal connection between the original industrial accident and claimant's hypertension, competency of the evidence on which the commission had based its findings of fact was not affected by the fact that medical testimony before the commission was in the form of depositions. *Gradwohl v. J.R. Simplot Co.*, 96 Idaho 655, 534 P.2d 775 (1975).

Where the commission's finding that a claimant had left his employment voluntarily without good cause was supported by substantial competent evidence, its conclusion that the claimant was ineligible for unemployment insurance benefits would not be reversed on claimant's contention that the decision was based upon improperly admitted evidence. *Nenoff v. Culligan Soft Water*, 97 Idaho 243, 542 P.2d 837 (1975).

The supreme court will not substitute its views of the facts for the findings of facts made by the industrial commission if the findings are supported by substantial evi-

dence. *Troutner v. Traffic Control Co.*, 97 Idaho 525, 547 P.2d 1130 (1976).

Where claimant was examined by five doctors following accident and none could state with probability that the pain was directly caused by the accident, and where claimant had previously been treated for upper back pain twice prior to the accident, the decision of the industrial commission denying claim for partial permanent disability was supported by substantial competent evidence under this section and supportable as a matter of law under Idaho Const., Art. 5, § 9. *George v. American Smelting & Ref. Co.*, 101 Idaho 781, 621 P.2d 397 (1980).

The fact that a greater number of witnesses supported a view different from the conclusion reached by the commission is of no moment in determining the preponderance of the evidence supporting the commission's decision. Rather, the determination must be based on an assessment of the reliability, trustworthiness, and probative value of the evidence. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

Where an orthopedic surgeon gave expert medical testimony that based on his examination of the claimant and the results of an arthoscopy exam of the claimant's knee, it was his opinion that the claimant had a permanent physical impairment equivalent to ten percent as compared to the loss of the leg at the hip but that the disability should not prevent the claimant from returning to his former vocation as a diesel mechanic, such testimony constituted substantial competent evidence supporting the commission's finding of fact that the claimant suffered a permanent partial disability of ten percent loss of the leg at the hip. *Houser v. Southern Idaho Pipe & Steel, Inc.*, 103 Idaho 441, 649 P.2d 1197 (1982).

Where the industrial commission found that the claimant, who was living with the decedent at the time of his death but was not married to him, did not hold herself out as married, which finding was supported by substantial, competent evidence and supported the ultimate finding that there was no common-law marriage, appellate court would not disturb the commission's order denying workmen's compensation benefits to the claimant. *Graham v. Larry Donohoe Logging*, 103 Idaho 824, 654 P.2d 1377 (1982).

Compensation is recoverable where an employee's work causes an injury to the employee which results in violence to the physi-



cal structure of the body or causes an accident which aggravates or accelerates a previous disease condition of the employee, and an employee must establish his employment caused or contributed to his injury. *Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 695 P.2d 1250 (1985).

Where the industrial commission found that while claimant's pain may have been caused by his strenuous work, claimant's heart attack, which occurred four days after claimant ceased working, was not caused by claimant's work but was due to an accelerating coronary disease; since pain alone is not compensable (because it does not cause violence to the physical structure of the body) claimant was not entitled to worker's compensation benefits. *Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 695 P.2d 1250 (1985).

Court affirmed denial of unemployment benefits where the industrial commission's final decision was that the statements which were made by the employer during a heated argument were not statements which would reasonably be interpreted as discharging the claimant. *Porter v. Gem State Plumbing*, 119 Idaho 54, 803 P.2d 555 (1990).

Continuing the policy of deferring to the credibility determination of the industrial commission, the supreme court of Idaho affirmed the Commission's finding that claimant's fall did not cause or accelerate the claimant's need for a hip replacement. *Ross v. Tupperware Mfg. Company/Premark*, 122 Idaho 641, 837 P.2d 316 (1992).

The industrial commission determined that Boise orthopedic surgeon's opinion that claimant's fall did not cause the need for hip replacement was more persuasive than Utah orthopedic surgeon's opinion that the injury was the cause. *Ross v. Tupperware Mfg. Company/Premark*, 122 Idaho 641, 837 P.2d 316 (1992).

Doctor's testimony that worker's compensation claimant's symptoms were from a later non-work related injury and not from an earlier work related accident constituted substantial competent evidence to support denial of benefits. *Monroe v. Chuck & Del's, Inc.*, 123 Idaho 627, 851 P.2d 341 (1993).

Commission's finding of no permanent impairment was supported by substantial and competent evidence where Commission considered numerous medical records from nearly a dozen physicians, found that claimant's testimony lacked credibility, found that even doctor who assigned whole body impairment rating of 17%, based his rating in part on claimant's subjective complaints of back pain and where Commission gave particular weight to the records and opinions of doctor, who wrote as follows: "In my opinion this gentleman sustained a contusion-sprain to

his back. He has been treated adequately, completely. His symptoms are overdetermined, there is not objective evidence of physical impairment from this alleged injury nor is there indication that he could not, on an objective basis, return to activity including that of his regular job." *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

There must be medical testimony with a reasonable degree of medical probability to support a worker's compensation claim. In this regard, "Probable" is defined as "having more evidence for than against." Where hearsay evidence is admitted without objection in proceedings before the Commission, it properly may be considered in determining the facts. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

Where the record revealed two doctors' work restrictions on December 28, 1989 and March 17, 1990, respectively, and nothing showing claimant's condition improved in the interim, the referee's conclusion that claimant was "mistakenly" restricted from work was not supported by the evidence, and thus, the denial of TTD benefits before March 17, 1990 was not supported by the evidence. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

There was substantial and competent evidence to support the industrial commission's finding that claimant did not prove that he could not do the work that was attempted for while it was clear he could no longer lift packages, psychologist, physical therapist and physician determined that claimant could perform sedentary work under certain conditions. *Wheaton v. Industrial Special Indem. Fund*, 129 Idaho 538, 928 P.2d 42 (1996).

The appellate court in review of Commission decisions is limited to a determination of whether the findings of fact are supported by substantial and competent evidence; substantial evidence is more than a scintilla of proof, but less than a preponderance; it is such relevant evidence as a reasonable mind might accept to support a conclusion. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

#### —Accident.

Workers' compensation claimant bears the burden of proving that an injury-causing accident occurred by proving that an unexpected, undesigned, and unlooked for mishap or untoward event took place, and where claimant's injury was an aggravation of an existing knee injury sustained in 1987, claimant did not meet this burden and commission's finding that he failed to prove the occurrence of a compensable accident within the meaning of § 72-102 was based on sub-

stantial and competent evidence and was not clearly erroneous. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

Where worker made a claim for occupational disease, the claimant had the burden of proving, to a reasonable degree of medical probability, a causal connection between the condition for which compensation was claimed and occupational exposure to the substance or conditions which caused the alleged condition, and although physician's records indicated that claimant's work environment may have irritated his asthma condition, none stated that his condition was related, to a reasonable degree of probability, to his work environment, thus the industrial commission's conclusion denying compensation was supported by substantial and competent evidence and would not be disturbed on appeal. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

#### —Burden.

Worker's compensation claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden and the issue of causation must be proved by expert medical testimony. *Trimble v. Engelking*, 130 Idaho 300, 939 P.2d 1379 (1997).

Industrial commission of the state of Idaho's factual findings were upheld where the claimant had not met his burden of showing that his current complaints were related to the industrial accident, and that more than likely they were related to such things as degenerative arthritic conditions unrelated to the accident. *Rudolph v. Spudnik Equip.*, 139 Idaho 776, 86 P.3d 490 (2004).

Substantial evidence is more than a scintilla of proof, but less than a preponderance. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 975 P.2d 1178 (1999).

#### —Causation.

Where industrial commission concluded that claimant's accident failed to rise to a compensable level, as defined by § 72-102(15) (now (17)), because worker failed to provide any proof, to a reasonable degree of medical certainty, that the damage asserted was caused by the accident and failed to demonstrate on appeal that the commission's holding was clearly erroneous or that its finding was not supported by substantial and competent evidence under this section, the commission's conclusion was affirmed. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

#### —Medical Expenses.

Where two separate medical panels formulated an impairment rating amounting to

twenty percent of the whole person, even though two other doctors formulated higher impairment ratings, there was substantial and competent evidence supporting the industrial commission's finding of a twenty percent impairment rating. *Pomerinke v. Excel Trucking Transport*, 124 Idaho 301, 859 P.2d 337 (1993).

#### Findings of Commission.

If the findings of fact of the industrial commission are supported by substantial competent evidence, they will not be disturbed by the court on appeal. *Levesque v. Hi-Boy Meats, Inc.*, 95 Idaho 808, 520 P.2d 549 (1974); *Gradwohl v. J.R. Simplot Co.*, 96 Idaho 655, 534 P.2d 775 (1975); *Dean v. Dravo Corp.*, 97 Idaho 158, 540 P.2d 1337 (1975).

Where neurosurgeon who treated claimant testified that in his opinion claimant was suffering from intercostal neuritis as a result of an industrial accident, there was substantial evidence to support commission's finding that claimant sustained a disabling injury as a result of a work-related accident. *McCoy v. Sunshine Mining Co.*, 97 Idaho 675, 551 P.2d 630 (1976).

In hearings on claimant's application for full income benefits as surviving widow of employee who was killed when his semi-truck overturned, the commission did not err in its conclusion that there was a lack of substantial evidence in the record that employee's death was caused by intoxication, even though test results revealed that decedent had .117 percent blood alcohol level, where truck stop proprietors testified that employee's behavior was normal and that he did not appear to be intoxicated. *Hatley v. Lewiston Grain Growers, Inc.*, 97 Idaho 719, 552 P.2d 482 (1976).

Where a claimant was suffering from coronary artery disease prior to his heart attack, smoked heavily, was overweight, failed to exercise regularly and could have been experiencing emotional stress as a result of a recent change in his domestic situation, the court would not disturb the industrial commission's conclusion that the claimant's heart attack resulted from his coronary artery disease rather than from his employment so that his claim for workmen's compensation benefits must be denied. *Beslanwitch v. Valley Dodge Center, Inc.*, 98 Idaho 390, 565 P.2d 583 (1977).

The commission's finding that claimant failed to give timely notice of his accident to the employer was correct, where the record indicated that the employer did not learn that claimant was claiming a work-related accident until some time after June 7, approximately four months after the date of the accident, and where prior to that time claimant had not filed an accident report with his



employer, even though his position as warehouse foreman required him to participate in and become familiar with the plant's safety program, including its policy of reporting every accident regardless of how minor it might be. *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979).

The determination of whether or not the claimant falls within the "odd-lot" classification is a factual one; such a determination of fact by the commission can be set aside only if not based on substantial competent evidence. *Reifsteck v. Lantern Motel & Cafe*, 101 Idaho 699, 619 P.2d 1152 (1980).

Findings of fact made by the industrial commission are subject to limited appellate review, and the supreme court's function is to determine whether the findings are supported by substantial, competent evidence. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983).

In the presence of conflicting evidence in workmen's compensation proceedings, the supreme court continues to recognize the industrial commission as the arbiter, and acknowledge that the weight to be accorded evidence is within their particular province. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983).

Where uncontroverted evidence showed that claimant's symptoms were caused by a ruptured disc which appeared prior to first surgery to remove fibrous tissue on spine, commission's finding to the contrary must be reversed. *Wynn v. J.R. Simplot Co.*, 105 Idaho 102, 666 P.2d 629 (1983).

The factual findings of the industrial commission will not be overturned on appeal unless they are unsupported by substantial and competent evidence; further, the industrial commission will be the arbiter of conflicting evidence. *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

Where the record was devoid of any evidence upon which supreme court might sustain the commission's finding as to the reason for the surety's inaction on claimant's application for hearing, the holding of the commission was unsupported as a matter of law and was reversed. *Nelson v. Pumnea*, 106 Idaho 48, 675 P.2d 27 (1983).

Where the commission found that the claimant was 55 years of age, had an eighth grade education, was considerably restricted in his movements and ambulation, was unable to use any of the skills he had acquired due to the injuries to his hip and back, and that he had sought employment unsuccessfully, there was substantial, competent evidence to support the commission's determination, that claimant made a prima facie showing that he was an "odd-lot" worker. *Neilson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984).

Where contested findings of the industrial commission are supported by substantial, competent evidence, those findings will not be disturbed on appeal; thus, although the evidence was conflicting as to whether claimant was an odd-lot worker, the commission's findings in this matter were supported by substantial and competent evidence and would not be disturbed on appeal. *Bell v. Clear Springs Trout Co.*, 107 Idaho 568, 691 P.2d 1183 (1984).

Findings of fact made by the industrial commission are subject to limited appellate review; the court's function is to determine whether the findings are supported by substantial, competent evidence. *Lopez v. Amalgamated Sugar Co.*, 107 Idaho 590, 691 P.2d 1205 (1984).

The industrial commission did not err in its factual determination that claimant's partial permanent disability was thirty-five percent of the whole man, even though the testifying physician assigned a sixty percent impairment, where the physician's testimony was impeached by his own prior letters and records. *Goicoechea v. Blincoe's Magic Valley Packing Co.*, 108 Idaho 403, 700 P.2d 25 (1985).

The supreme court will not disturb findings of fact by the industrial commission when they are supported by competent, although conflicting, evidence; the supreme court may set aside the Commission's findings of fact only if the record is devoid of substantial competent evidence to support them. Thus, where the testimony demonstrated that the record was devoid of any substantial competent evidence to support the disability award of 50 percent of the whole man, reversal and remand were proper. *Johnson v. Amalgamated Sugar Co.*, 108 Idaho 765, 702 P.2d 803 (1985).

The industrial commission's determination that the death of claimant's husband did not arise out of and in the course of his employment was proper where the Commission's findings that there was no employer tradition of an annual Christmas party, that the death occurred after decedent left a Christmas party arranged by a few employees and that the death occurred off of the employer's premises were supported by substantial evidence. *Snyder v. Burl C. Lange, Inc.*, 109 Idaho 167, 706 P.2d 56 (1985).

The industrial commission's findings of fact will not be disturbed if supported by competent, although conflicting, evidence. *Snyder v. Burl C. Lange, Inc.*, 109 Idaho 167, 706 P.2d 56 (1985).

The credibility of witnesses is for the industrial commission to determine since the commission has the opportunity to observe their demeanor. *Cox v. Denny's Restaurants*, 112 Idaho 321, 732 P.2d 290 (1987).

The finding of the industrial commission that the claimant was not required to work 80-120 hours a week during the absence of the assistant manager was supported by substantial competent, although conflicting evidence, and hence would not be disturbed, where the claimant did not keep a time card, there was no unusual surge of business activity requiring extraordinary hours, there was available personnel and man hours per shift to do the work, when claimant was absent from the restaurant for a week during May the assistant manager adequately managed the restaurant, putting in approximately 70 hours per week, and claimant did not work at all times when she was in the restaurant but spent hours there which were not required. *Cox v. Denny's Restaurants*, 112 Idaho 321, 732 P.2d 290 (1987).

Record supported commission's decision that worker failed to sustain his burden of proving that his injury arose out of and in the course of employment with any of the defendants where worker had already been terminated at the time of the alleged back injury and where worker's actions regarding the installation of a water heater were voluntary. *Parker v. Engle*, 115 Idaho 860, 771 P.2d 524 (1989).

The supreme court will not overturn factual findings made by the industrial commission when those findings are supported by substantial and competent evidence. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992).

The supreme court will uphold findings by the industrial commission supported by substantial and competent evidence, even if conflicting evidence exists. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 834 P.2d 878 (1992).

Court imposed sanctions on the attorney for claimant, personally and individually, in a sum equal to reasonable attorney fees incurred by respondent on appeal, where attorney admitted during oral argument before court, that substantial and competent evidence in the record supported the commission's finding that the preponderance of the medical evidence established that the September 1991 incident did not cause an injury nor did it cause or aggravate the condition for which claimant sought worker's compensation. *Talbot v. Ames Constr.*, 127 Idaho 648, 904 P.2d 560 (1995).

In review of an appeal from the industrial commission, the Commission's conclusions of law are freely reviewed by the supreme court, and its findings of fact will be upheld if they are supported by substantial and competent evidence in the record, evidence which a reasonable mind might accept such evidence as adequate and sufficient to support a conclu-

sion. *Smith v. J.B. Parson Co.*, 127 Idaho 937, 908 P.2d 1244 (1996).

The determination of whether an injury arose from the course of employment is a question of fact. If there is conflicting evidence, the supreme court will not overturn factual findings supported by substantial competent evidence. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375 (1997).

Workers' compensation claimant did not meet her burden of proving entitlement to permanent partial impairment or disability benefits where on appeal, her brief did not offer guidance as to what specific aspects of the industrial commission's decision were under review or what relief was being sought, and she did not present a legally supported argument in her appeal since she failed to demonstrate any error by the commission. *Stewart v. Sun Valley Co.*, 140 Idaho 381, 94 P.3d 686 (2004).

#### **Remand to Commission.**

A claimant was not denied due process in proceedings before the commission, where, on remand of claimant's first appeal from the commission's denial of unemployment compensation benefits, the commission advised the claimant that if he wished to present additional evidence he had a ten day period in which to request the right to do so and claimant failed to attend the requested hearing to present such additional evidence. *Nenoff v. Culligan Soft Water*, 97 Idaho 243, 542 P.2d 837 (1975).

Where the industrial commission summarily denied motion for reconsideration without addressing the applicability of § 72-403 to claim for benefits even though it had been fully confronted with the issue of whether § 72-403 applied, the commission should have passed on this issue before it was considered by the supreme court, and, accordingly, the order of the industrial commission was reversed and the cause remanded for findings of fact and conclusions of law on the issue of whether § 72-403 barred the claim to benefits. *Gomez v. Rangen's, Inc.*, 105 Idaho 337, 670 P.2d 42 (1983).

Commission's determination, that worker was entitled to no additional permanent disability benefits for the second injury since there was absent an increase in permanent impairment attributable to the second accident, was error; commission's ruling on permanent impairment was not based on substantial evidence where worker claimed an increased level of impairment and relied upon evidence that his previously asymptomatic hip had become painful after the second injury, and where commission made no finding as to whether the hip pain actually existed, whether the pain (if it did exist) was attrib-



utable to the second injury, or whether the pain (if it did exist and was attributable to the second injury) had produced any additional functional loss. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989).

### Scope of Review.

Appellate review of findings of fact made by the industrial commission is limited in scope and does not entail a de novo determination of fact. The supreme court is not concerned with whether such court would have reached the same conclusion, but rather, with whether the findings by the commission are supported by substantial, competent evidence. *Graham v. Larry Donohoe Logging*, 103 Idaho 824, 654 P.2d 1377 (1982).

In reviewing industrial commission decisions the supreme court must determine whether the industrial commission's findings of fact are supported by substantial competent evidence. *Snyder v. Burl C. Lange, Inc.*, 109 Idaho 167, 706 P.2d 56 (1985).

The supreme court's standard of review is limited to determining whether the industrial commission's findings and conclusions are supported by substantial and competent evidence, even though the evidence before the Commission was presented by written record rather than through personal appearances at a hearing. *Blayney v. City of Boise*, 110 Idaho 302, 715 P.2d 972 (1986).

The supreme court is not bound by the conclusions of law which are drawn by the industrial commission; in other words, the supreme court must set aside the order of the Commission where it failed to make a proper application of law to the evidence. *Bortz v. Payless Drug Store*, 110 Idaho 942, 719 P.2d 1202 (1986).

The court is not bound by conclusions of law drawn by the industrial commission; an order of the commission must be set aside where the law is misapplied to the evidence. On questions of law the court exercises free review. *Combs v. Kelly Logging*, 115 Idaho 695, 769 P.2d 572 (1989).

Supreme court of Idaho's review on appeal from a commission decision is limited to questions of law, and an ascertainment as to whether the industrial commission's factual findings are based on substantial competent evidence. *Loya v. J.R. Simplot Co.*, 120 Idaho 62, 813 P.2d 873 (1991).

The scope of the supreme court's review in compensation cases is limited to questions of law and determinations of whether the industrial commission's findings of fact are supported by substantial, competent evidence. Determinations of permanent impairment and temporary disability are question of fact for the industrial commission. If conflicting evidence exists, the supreme court will not

overturn factual findings, supported by substantial and competent evidence; it does not scrutinize the weight and credibility of the evidence relied on by the Commission and will disturb the Commission's findings regarding weight and credibility only if they are clearly erroneous. *Soto v. J.R. Simplot*, 126 Idaho 536, 887 P.2d 1043 (1994).

Supreme court's review of decisions of the industrial commission is limited to questions of law; accordingly, factual determinations made by the Commission will not be overturned when supported by substantial and competent, though conflicting, evidence; the substantial and competent evidence standard is consistent with the clearly erroneous standard of I.R.C.P. 52(a). *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

The Idaho supreme court's review of unemployment compensation cases involving factual disputes is restricted to determining whether the findings of fact by the industrial commission are supported by substantial and competent evidence in the record. *Taylor v. Burley Care Ctr.*, 121 Idaho 792, 828 P.2d 821 (1991).

A clearly erroneous standard is utilized by the supreme court under this section, on review of a determination by the industrial commission in regard to worker claimant's eligibility for workers' compensation benefits. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

On supreme court review of industrial commission decisions on appeal, the supreme court reviews questions of fact only to determine if there was substantial and competent evidence to support the findings of the commission, but exercises free review over questions of law under Const., Art. V, § 9 and this section. *Langley v. State, Indus. Special Indem. Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

Supreme court review of industrial commission decisions is limited to a determination whether the findings of fact are supported by substantial and competent evidence; which substantial evidence is more than a scintilla of proof, but less than a preponderance; it is relevant evidence which a reasonable mind might accept to support a conclusion. *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 911 P.2d 754 (1996).

The supreme court limits the scope of its review to questions of law and determinations of whether the Commission's findings of fact are supported by substantial competent evidence; construes the record most favorably to the party prevailing below and does not try the matter anew. *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 939 P.2d 1375 (1997).

In reviewing a decision of the Commission the appellate court will not disturb the Commission's conclusions on the weight and cred-

ibility of the evidence unless they are clearly erroneous. *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 939 P.2d 854 (1997).

Industrial commission's findings of fact will not be disturbed on appeal, where they are supported by substantial and competent evidence and where conflicting evidence is presented that is supported by substantial, competent evidence; the findings reached by the commission must be sustained regardless of whether the appellate court may have reached a different conclusion. *Harris v. Elec. Wholesale*, 141 Idaho 1, 105 P.3d 267 (2004).

**Cited in:** *Clark v. Daniel Morine Constr. Co.*, 98 Idaho 114, 559 P.2d 293 (1977); *Hutchinson v. J.R. Simplot Co.*, 98 Idaho 346, 563 P.2d 404 (1977); *Jenkins v. Agri-Lines Corp.*, 100 Idaho 549, 602 P.2d 47 (1979); *Dick v. Amalgamated Sugar Co.*, 100 Idaho 742, 605 P.2d 506 (1979); *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 605 P.2d 939 (1980); *Gray v. Brasch & Miller Constr. Co.*, 102 Idaho 14, 624 P.2d 396 (1981); *Roper v. Guerdon Indus., Inc.*, 102 Idaho 19, 624 P.2d 401 (1981); *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981); *Knapp v. Brotherton's, Inc.*, 102 Idaho 403, 630 P.2d 690 (1981); *Bush v. Bonners Ferry Sch. Dist.* No. 101, 102 Idaho 620, 636 P.2d 175 (1981); *Gordon v. West*, 103 Idaho 100, 645 P.2d 334 (1982); *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2d 1214 (1982); *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983); *Bint v. Creative Forest Prods.*, 108 Idaho 116,

697 P.2d 818 (1985); *Cone v. Clearwater Valley Hosp.*, 109 Idaho 655, 710 P.2d 565 (1985); *Burdick v. Thornton*, 109 Idaho 869, 712 P.2d 570 (1985); *Seese v. Ideal of Idaho, Inc.*, 110 Idaho 32, 714 P.2d 1 (1985); *Beaty v. City of Idaho Falls*, 110 Idaho 891, 719 P.2d 1151 (1986); *Malueg v. Pierson Enters.*, 111 Idaho 789, 727 P.2d 1217 (1986); *O'Loughlin v. Circle A Constr.*, 112 Idaho 1048, 739 P.2d 347 (1987); *Vernon v. Omark Indus.*, 113 Idaho 358, 744 P.2d 86 (1987); *Greenrod v. Parris*, 115 Idaho 109, 765 P.2d 134 (1988); *Johnson v. Bennett Lumber Co.*, 115 Idaho 241, 766 P.2d 711 (1988); *Colpaert v. Larson's, Inc.*, 115 Idaho 825, 771 P.2d 46 (1989); *Mortimer v. Riviera Apts.*, 122 Idaho 839, 840 P.2d 383 (1992); *Hamilton v. Ted Beamis Logging & Constr.*, 127 Idaho 221, 899 P.2d 434 (1995); *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 900 P.2d 1348 (1995); *Welch v. Cowles Publishing Co.*, 127 Idaho 361, 900 P.2d 1372 (1995); *Reedy v. M.H. King Co.*, 128 Idaho 896, 920 P.2d 915 (1996); *Bybee v. State, Indus. Special Indemnity Fund*, 129 Idaho 76, 921 P.2d 1200 (1996); *Kessler ex rel. Kessler v. Payette County*, 129 Idaho 855, 934 P.2d 28 (1997); *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998); *Clark v. City of Lewiston*, 133 Idaho 723, 992 P.2d 172 (1999); *Stoica v. Pocol*, 136 Idaho 661, 39 P.3d 601 (2001); *Cheung v. Wasatch Elec.*, 136 Idaho 895, 42 P.3d 688 (2002); *Ewins v. Allied Sec.*, 138 Idaho 343, 63 P.3d 469 (2003); *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Assignment of error.

Evidence.

Findings of board.

—Conflicting evidence.

Fraud.

In general.

Judgment on appeal.

Questions of law.

Remanding case.

Second appeal.

Settlement agreement approved by board.

Sufficiency of evidence.

### Assignment of Error.

In compensation cases, assignments of error not discussed, orally or in brief and on which no authorities were cited would not be considered by the supreme court. *Crowley v. Idaho Indus. Training Sch.*, 53 Idaho 606, 26 P.2d 180 (1933).

Where there was no statutory or other binding requirement of assignment of errors on appeal to the district court from the industrial accident board, it was error for the court

to dismiss the appeal for failure to assign errors. *Long v. State Ins. Fund*, 60 Idaho 257, 90 P.2d 973 (1939).

Where the appellant made five specifications of error and recited that "The Industrial Accident Board erred" "in entering its Findings of Fact" "V" and "VI," "in entering its Rulings of law I" and "II" and "in entering its award in favor of the State of Idaho and disallowing the applicant's claim of dependency," sufficiently met the requirements of



the rules of the supreme court to warrant a review by the tribunal where the specifications were thoroughly discussed in briefs and supported by relevant authority. *Mauldin v. Sunshine Mining Co.*, 61 Idaho 9, 97 P.2d 608 (1939).

Error was never presumed on appeal, but appellants had the burden of showing error affirmatively. *Patrick v. Smith Baking Co.*, 64 Idaho 190, 129 P.2d 651 (1942).

### **Evidence.**

The supreme court would review the evidence produced before the industrial accident board, upon which they made findings, to determine its competency and relevancy to support the findings made by such board, and would be governed by rules applicable to a trial before the court. *In re Black*, 58 Idaho 803, 80 P.2d 24 (1938), overruled on other grounds, *Hite v. Kulhenak Bldg. Contractors*, 96 Idaho 70, 524 P.2d 531 (1974).

Introduction into evidence by the commission of the AMA Guide to Evaluation of Permanent Impairment (1971), was permissible and represented "substantial competent" evidence. *Hite v. Kulhenak Bldg. Contractor*, 96 Idaho 70, 524 P.2d 531 (1974).

### **Findings of Board.**

While findings of fact are conclusive on appeal, there must be some evidence in support thereof, and where such findings are absolutely unsupported they may be reviewed as matter of law. *Ybaibarriaga v. Farmer*, 39 Idaho 361, 228 P. 227 (1924); *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927); *In re Hillhouse's Estate*, 46 Idaho 730, 271 P. 459 (1928); *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929); *Jenkins v. Boise Payette Lumber Co.*, 49 Idaho 24, 287 P. 202 (1930); *Beaver v. Morrison-Knudsen Co.*, 55 Idaho 275, 41 P.2d 605 (1934); *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935); *Stoddard v. Mason's Blue Link Stores*, 55 Idaho 609, 45 P.2d 597 (1935); *Bybee v. Idaho Equity Exch.*, 57 Idaho 396, 65 P.2d 730 (1937); *In re Black*, 58 Idaho 803, 80 P.2d 24 (1938); *Chambers v. State ex rel. Parsons*, 59 Idaho 200, 81 P.2d 748 (1938); *Paull v. Preston Theatres Corp.*, 63 Idaho 594, 124 P.2d 562 (1942); *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942).

Unless the board or a majority thereof heard and saw the witness testify, its findings were not considered conclusive by a court on appeal. *Phipps v. Boise St. Car Co.*, 61 Idaho 740, 107 P.2d 148 (1940).

When the issue as to notice was raised, the failure of the board to find thereon was reversible error and required remanding of the proceedings for further findings of facts. *Clayton v. Hercules Mining Co.*, 63 Idaho 301, 119 P.2d 890 (1941).

Where the facts disclosed in a settlement

agreement between an injured employee and the employer were adopted by the industrial accident board as its findings of fact, they were conclusive as between the parties in the absence of fraud. *Zapantis v. Central Idaho Mining & Milling Co.*, 64 Idaho 498, 136 P.2d 154 (1943).

The extent of a logger's disability preventing performance of such logging duties as he had been able to do prior to injury, raised no more than a question of fact, and the board's finding thereon was not subject to review by the supreme court. *McCall v. Potlatch Forests, Inc.*, 67 Idaho 415, 182 P.2d 156 (1947).

Finding of the industrial accident board based on substantial though conflicting evidence on factual issues was binding on appeal. *Limprecht v. Bybee*, 76 Idaho 293, 281 P.2d 1047 (1955).

It was only in cases where the evidence was not conflicting and not in dispute that the application of law to the undisputed facts raised a question of law granting the supreme court jurisdiction on appeals from the industrial accident board. *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957).

The finding of the board that claimant failed to prove more than a possibility that the injury to her husband contributed to or hastened death was conclusive, the claim being based upon the asserted ground that the injury sustained in the fall aggravated pre-existing infirmities and thus contributed to and hastened death which was directly due to nephritis. *Peterson v. Jerome Coop. Creamery Ass'n*, 79 Idaho 406, 319 P.2d 187 (1957).

With respect to factual findings of the board, the supreme court was restricted to a determination of whether the findings were supported by substantial and competent evidence. *Madron v. Green Giant Co.*, 94 Idaho 747, 497 P.2d 1048 (1972).

Findings supported by substantial evidence must stand. *Lynskey v. Lind*, 94 Idaho 788, 498 P.2d 1261 (1972).

### **—Conflicting Evidence.**

The weight and credence to be given evidence was for the industrial board to determine. The board's findings when supported by substantial competent evidence, had to be sustained, even though there may have been other conflicting evidence. *In re Sutton*, 83 Idaho 265, 361 P.2d 793 (1961).

Where the facts were in conflict as to the actual relationship existing, it became the duty of the trier of facts to determine the ultimate fact whether the relation was that of employer and employee or principal and independent contractor. *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963).

Whether the death of a man suffering from acute myocardial infarction who died from a coronary thrombosis or occlusion while at-

tempting to loosen gravel around a manhole cover with a pick was due to overexertion or strain was a question of fact for the board and, where the evidence was conflicting, the board's finding will not be set aside on appeal. *Bradshaw v. Bench Sewer Dist.*, 90 Idaho 557, 414 P.2d 661 (1966).

The Industrial Accident Board was the arbiter of conflicting evidence presented in a claim under the Workmen's Compensation Law, and if the board's determination was supported by substantial, competent evidence, it would not be disturbed on appeal. *Hamby v. J.R. Simplot Co.*, 94 Idaho 794, 498 P.2d 1267 (1972) (decision prior to 1995 amendment).

### **Fraud.**

The failure of the industrial accident board to award compensation for the loss of a kidney equivalent to that allowed for the loss of an arm at the shoulder, did not, in and of itself, constitute "fraud in law" so as to entitle the claimant, after time for appeal therefrom had expired, to reopen the matter on an application for a review of the award, since whether the claimant would be entitled to the compensation equivalent to that allowed for the loss of an arm at the shoulder necessarily depended upon the evidence in the case. *Bower v. Smith*, 63 Idaho 128, 118 P.2d 737 (1941).

A mistake in the ascertainment of the amount of compensation payable to an injured employee did not constitute "fraud," either active or constructive. *Zapantis v. Central Idaho Mining & Milling Co.*, 64 Idaho 498, 136 P.2d 154 (1943).

Absent fraud an award by the board was final and conclusive, unless modification was sought or an appeal taken. *Nitkey v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 73 Idaho 294, 251 P.2d 216 (1952).

### **In General.**

The validity of an award had to be affirmatively shown in case of direct attack and no presumptions in favor of jurisdiction or due process could be indulged. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923), overruled on other grounds, *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982).

All questions arising under the act were determinable by board, with right of appeal from its decisions. *Western Hosp. Ass'n v. Industrial Accident Bd.*, 51 Idaho 334, 6 P.2d 845 (1931).

### **Judgment on Appeal.**

On appeal from an award of the industrial accident board, an independent judgment may have been entered. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

### **Questions of Law.**

Question whether policy of insurance had been legally canceled was question of law which was subject to review by court. *Hauter v. Coeur d'Alene Antimony Mining Co.*, 39 Idaho 621, 228 P. 259 (1923).

Order or determination denying lump sum settlement was appealable to court. *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927).

Court was limited to questions of law though facts were stipulated. *Walker v. Hyde*, 43 Idaho 625, 253 P. 1104 (1927); *E. T. Chapin Co. v. Scott*, 44 Idaho 566, 260 P. 172 (1927).

Where it was stipulated by the parties that the claimant's claim was not filed within a year after the accident, the court had to conclude that the claimant could not recover compensation. *Moody v. State Hwy. Dep't*, 56 Idaho 21, 48 P.2d 1108 (1935).

Where an appellant did not, by specification of error, challenge the board's conclusion of law that a claimant was entitled to an award of compensation because actually dependent wholly or partially on decedent, there was no question of law presented as to what effect, if any, the resumption of the marital relationship between claimant and her husband had on her claim for compensation based on such dependency on deceased son. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

Whether findings of the industrial accident board were supported by substantial, competent evidence so as to be conclusive on appeal was a "question of law" to be determined by the court. *Paull v. Preston Theatres Corp.*, 63 Idaho 594, 124 P.2d 562 (1942); *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942).

The supreme court was able to pass on question of law only in compensation appeals. *Benson v. Jarvis*, 64 Idaho 107, 127 P.2d 784 (1942); *Cameron v. Bradley Mining Co.*, 66 Idaho 409, 160 P.2d 461 (1945); *Wells v. Potlatch Forests, Inc.*, 67 Idaho 420, 183 P.2d 202 (1947); *Miller v. State*, 69 Idaho 122, 203 P.2d 1007 (1949); *Ramsey v. Employment Sec. Agency*, 85 Idaho 395, 379 P.2d 797 (1963).

Where the facts were undisputed and the only question decided was whether or not the claimant's employment was casual, it was a question of law, the determination of which by the industrial accident board was within the province of the supreme court to review. *Wachtler v. Calnon*, 90 Idaho 468, 413 P.2d 449 (1966).

In an appeal from an Industrial Accident Board ruling, the supreme court was limited to questions of law. *Madron v. Green Giant Co.*, 94 Idaho 747, 497 P.2d 1048 (1972).

### **Remanding Case.**

A cause may have been remanded for further proceedings on failure to find measure of compensation. *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).



The court remanded this case to permit proof that payments erroneously made to nonqualified foreign guardian were used for benefit of wards, dependents of deceased workman. *In re Bones*, 48 Idaho 85, 280 P. 223 (1929).

Case was remanded for the employee to establish his status by taking of additional evidence. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935); *Dehlin v. Shuck*, 63 Idaho 620, 124 P.2d 244 (1942).

Where the claimant was a stockholder, director and manager of his employer corporation, and it appeared that the industrial accident board had decided the case without considering all the available evidence, the order denying compensation would be reversed and the matter remitted to the industrial accident board with instructions to take additional evidence, which appeared to be available, in order to establish whether or not the claimant was employed as a laborer at the time the injury was sustained so as to come within the purview of the Workmen's Compensation Law. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

Where no award was made by the board and the evidence was insufficient to sustain the findings of the board adverse to the claimant, but the evidence to sustain findings and an award in favor of the claimant was sufficient to entitle him to recover compensation, the supreme court (and formerly the district court) may have remanded the case to the board with instructions to enter up an award in favor of claimant. *Fields v. Buffalo-Idaho Mining Co.*, 55 Idaho 212, 40 P.2d 114 (1935).

Case was remanded for evidence as to the cause of death, where findings were contradictory. *Nistad v. Winton Lumber Co.*, 59 Idaho 533, 85 P.2d 236 (1938).

The supreme court may have sent the case back to the industrial accident board for additional findings of fact where the award was affirmed but was upon different grounds to those assigned by the industrial accident board, as where the industrial accident board decided there was an accident and the supreme court concluded there was no accident, but that the claim would be sustained on the theory that the deceased died from an occupational disease. *Goasind v. Pocatello*, 61 Idaho 435, 102 P.2d 650 (1940).

This case was remanded by the court to take further evidence to determine facts concerning partial disability. *Herman v. Sunset Mercantile Co.*, 66 Idaho 47, 154 P.2d 487 (1944).

Where doctor's testimony was that claimant had a low back disability, a disability of 15 to 18% of the loss of a leg at the hip and a like percentage of the loss of the arm at the shoulder, but there was ambiguity in the record as to whether these two estimates

related to an industrial accident or an automobile accident which was not compensable, the board should have taken additional testimony or made an award upon the record. *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963).

### **Second Appeal.**

Where there had been an appeal from the award of the industrial accident board to the supreme court, which was reversed for the lack of sufficient findings, and the industrial accident board was directed by the appellate court to make findings without directing what findings to make, or what conclusions to reach, the new award stood to all intents and purposes the same as if entered upon a new trial, and as if the second appeal was the first and only appeal taken therefrom, although no new evidence was heard by the board before the second findings and award were made and a motion would not lie to dismiss the appeal. *In re MacKenzie*, 55 Idaho 663, 46 P.2d 73 (1935). See also *In re MacKenzie*, 54 Idaho 481, 33 P.2d 113 (1934).

### **Settlement Agreement Approved by Board.**

Where surety, employer, and claimant entered into a settlement agreement subsequently approved by the board, and no appeal was taken to the supreme court within 30 days, the agreement had the same force and effect as a final award by the board and could not be set aside absent a showing of fraud. *Fountain v. T.Y. & Jim Hom*, 92 Idaho 928, 453 P.2d 577 (1969).

### **Sufficiency of Evidence.**

Findings of fact by industrial accident board, when supported by competent evidence, were conclusive on appeal to the supreme court, jurisdiction of said court being limited to review of questions of law. *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921). See also *Johnston v. White Lumber Co.*, 37 Idaho 617, 217 P. 979 (1923); *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923); *Ybaibarriaga v. Farmer*, 39 Idaho 361, 228 P. 227 (1924); *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926); *Kaylor v. Callahan Zinc-Lead Co.*, 43 Idaho 477, 253 P. 132 (1927); *Butler v. Anaconda Copper Mining Co.*, 46 Idaho 326, 268 P. 6 (1928); *Reader v. Milwaukee Lumber Co.*, 47 Idaho 380, 275 P. 1114 (1929); *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929); *Burchett v. Anaconda Copper Mining Co.*, 48 Idaho 524, 283 P. 515 (1929); *Jenkins v. Boise Payette Lumber Co.*, 49 Idaho 24, 287 P. 202 (1930); *Delich v. Lafferty Shingle Mill Co.*, 49 Idaho 552, 290 P. 204 (1930); *Strouse v. Hercules Mining Co.*, 51 Idaho 7, 1 P.2d 203 (1931); *Vaughn v. Robertson & Thomas*, 54 Idaho 138, 29 P.2d

756 (1934); *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934); *In re MacKenzie*, 55 Idaho 663, 46 P.2d 73 (1935); *In re Black*, 58 Idaho 803, 80 P.2d 24 (1938); *Golay v. Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939); *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939); *Watkins v. Cavanagh*, 61 Idaho 720, 107 P.2d 155 (1940); *Bower v. Smith*, 63 Idaho 128, 118 P.2d 737 (1941); *Strosheim v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941); *In re Cain*, 64 Idaho 389, 133 P.2d 723 (1943); *Smith v. Clearwater County*, 65 Idaho 271, 143 P.2d 561 (1943); *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946); *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

In reviewing hearings before industrial accident board upon question whether evidence sustained finding, court would consider competency, relevancy, and materiality of evidence according to rules applicable to trials in court. *McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921); *Ybaibarriaga v. Farmer*, 39 Idaho 361, 228 P. 227 (1924); *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929).

In cases where evidence was not conflicting and not in dispute, application of law to such undisputed evidence raised question of law and not of fact. *Johnston v. A.C. White Lumber Co.*, 37 Idaho 617, 217 P. 979 (1923); *Burchett v. Anaconda Copper Mining Co.*, 48 Idaho 524, 283 P. 515 (1929); *Horst v. Southern Idaho Oil Co.*, 49 Idaho 58, 286 P. 369 (1930); *Rabideau v. Cramer*, 59 Idaho 154, 81 P.2d 403 (1938); *Howard v. Texas Owyhee Mining & Dev. Co.*, 62 Idaho 707, 115 P.2d 749 (1941).

Where there is any competent and substantial evidence to support the board's findings, the findings will not be disturbed on appeal. *Taylor v. Blackwell Lumber Co.*, 37 Idaho 707, 218 P. 356 (1923); *Ybaibarriaga v. Farmer*, 39 Idaho 361, 228 P. 227 (1924); *Delich v. Lafferty Shingle Mill Co.*, 49 Idaho 552, 290 P. 204 (1930); *Larson v. Callahan Canning Co.*, 53 Idaho 746, 27 P.2d 967 (1933); *Scarborough v. Beardmore*, 55 Idaho 229, 41 P.2d 290 (1935); *Golay v. Stoddard*, 60 Idaho 168, 89 P.2d 1002 (1939); *Knight v. Younkin*, 61 Idaho 612, 105 P.2d 456 (1940); *Cole v. Fruitland Canning Ass'n*, 64 Idaho 505, 134 P.2d 603 (1943); *Zipse v. Schmidt Bros.*, 66 Idaho 30, 154 P.2d 171 (1944); *Starlovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948); *Johansen v. Ferry-Morse Seed Co.*, 69 Idaho 275, 206 P.2d 545 (1949); *Koegler v. C.F. Davidson Co.*, 69 Idaho 416, 209 P.2d 728 (1949); *Herman v. Coeur d'Alene Hdwe. & Foundry Co.*, 69 Idaho 423, 208 P.2d 167 (1949); *McGee v. Koontz*, 70 Idaho 507, 223 P.2d 686 (1950); *Shumaker v. Hunter Lease & Gold Hunter Mines*, 72 Idaho 173, 238 P.2d 425 (1951); *Adams v. Bitco, Inc.*, 72 Idaho 178, 238 P.2d 428 (1951); *Kernaghan v. Sunshine*

*Mining Co.*, 73 Idaho 106, 245 P.2d 806 (1952); *Zimmerman v. Harris Lumber Co.*, 82 Idaho 187, 350 P.2d 746 (1960); *In re Sutton*, 83 Idaho 265, 361 P.2d 793 (1961); *Findley v. Flanigan*, 84 Idaho 473, 373 P.2d 551 (1962); *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963); *Duerock v. Acarregui*, 87 Idaho 24, 390 P.2d 55 (1964); *Johnson v. Boise Cascade Corp.*, 93 Idaho 107, 456 P.2d 751 (1969); *Griffin v. Potlatch Forests, Inc.*, 93 Idaho 174, 457 P.2d 413 (1969); *Nelson v. Bogus Basin Recreational Ass'n*, 94 Idaho 175, 484 P.2d 290 (1971).

Receipt of incompetent evidence did not require reversal if there was competent evidence to sustain findings. *Butler v. Anaconda Copper Mining Co.*, 46 Idaho 326, 268 P. 6 (1928); *Arneson v. Robinson*, 59 Idaho 223, 82 P.2d 249 (1938).

Where there was no dispute in the evidence and it was not susceptible of more than one inference, then a question of law was presented, but if reasonable men could draw different inferences, then the findings of the industrial accident board were conclusive. *Vaughn v. Robertson & Thomas*, 54 Idaho 138, 29 P.2d 756 (1934); *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

Where it appeared that the average weekly wage had not been proven, but notwithstanding this fact compensation was arbitrarily fixed and allowed, the order would be reversed and the case remanded to the industrial accident board with directions to permit the employee to submit evidence supplying the deficiency, and that the board then make findings of fact and conclusions of law in conformity with the evidence. *Feuling v. Farmers' Co-op. Ditch Co.*, 54 Idaho 326, 31 P.2d 683 (1934).

The evidence was insufficient to sustain a finding of the board that the inhalation of copper carbonate fumes and dust by the claimant caused him to cough and sneeze a great deal, and that his infected appendix was disturbed and aggravated, and it became necessary to remove the same. *Liberg v. Genesee Union Whse. Co.*, 55 Idaho 123, 38 P.2d 999 (1934).

Positive medical evidence was sufficient to sustain a finding that the claimant's disability was due to his inhalation of sulphur dust while engaged in sulphuring peas for his employer. *Bybee v. Idaho Equity Exch.*, 57 Idaho 396, 65 P.2d 730 (1937).

Where the evidence tended to prove that the employee was going "down town" to his employer's office, where he kept on deposit the lodge funds of which he was treasurer, for the purpose of depositing funds he had collected for his employer, and to proceed on to the post office, which was also "down town," and that when the accident occurred, he was on the way which he could and would have



used in going to discharge either one of the duties; this evidence was sufficient to sustain an award of compensation as arising out of, and in the course of, his employment. *Potter v. Realty Trust Co.*, 60 Idaho 281, 90 P.2d 699 (1939). See however *Baldwin v. Singer Sewing Mach. Co.*, 49 Idaho 231, 287 P. 944 (1930).

Where there was a substantial conflict in the medical testimony as to whether the disease from which the employee died was transverse myelitis or acute poliomyelitis, the finding of the industrial accident board would not be disturbed. *Rand v. Lafferty Transp. Co.*, 60 Idaho 507, 92 P.2d 786 (1939).

If there was sufficient competent evidence to sustain the findings of the industrial accident board insofar as they were findings of fact, that there was no causal connection between the injury received by an employee from the accidental overturning of a truck, which concededly arose in the course of, and out of, his employment, and a gunshot wound which caused his death, then the supreme court was bound by such findings and had to affirm the order of the industrial accident board. *Brink v. H. Earl Clack Co.*, 60 Idaho 730, 96 P.2d 500 (1939). (The supreme court held there was a causal connection and reversed the order of the industrial board).

Where industrial accident board did not itself hear and determine claim for unemployment compensation but heard and determined claim on a transcript of evidence and proceedings had before the examiner, the supreme court was not bound by decision of board that discharged employee was guilty of such misconduct as to justify delay in payment of his unemployment compensation, but supreme court would examine the record to determine whether evidence showed such misconduct. *Phipps v. Boise St. Car Co.*, 61 Idaho 740, 107 P.2d 148 (1940).

The supreme court would not disturb a finding by the industrial accident board where the witnesses had personally appeared and testified before the board, and the evidence was of such nature as might lead different minds to different conclusions. *Fackenthall v. Eggers Pole & Supply Co.*, 62 Idaho 46, 108 P.2d 300 (1940).

A finding that claimant's condition was substantially the same as it had been more than a year earlier on the date of the entry of an award of compensation for the loss of a kidney, which had been removed as a result of the injury, was supported by claimant's own testimony with respect to his physical condition, as well as the testimony of physicians, and hence would not be disturbed by the supreme court on appeal from the board's order denying additional compensation. *Bower v. Smith*, 63 Idaho 128, 118 P.2d 737 (1941).

Testimony of a physician who observed and

treated the claimant over a period of several months regarding the permanency of claimant's disability, and the physician's opinion that the claimant was able to work at the time of the hearing, constituted "competent and substantial evidence," sustaining the industrial accident board's award allowing compensation for total temporary disability but denying compensation for permanent disability. *Stroschein v. Shay*, 63 Idaho 360, 120 P.2d 267 (1941).

The supreme court would not disturb an order of the industrial accident board dismissing an application for modification of a compensation agreement where the order was supported by substantial competent evidence. *Pruett v. Cranston Chevrolet Co.*, 63 Idaho 478, 121 P.2d 559 (1941).

On appeal, the supreme court could neither weigh the evidence nor make findings of fact. *Dyre v. Kloepper & Cahoon*, 64 Idaho 612, 134 P.2d 610 (1943).

Where witnesses testified by deposition and did not appear before the industrial accident board to testify and thus give the board an opportunity to hear and see them, the supreme court had to examine the evidence and determine its value. *Howard v. Washington Water Power Co.*, 65 Idaho 339, 144 P.2d 210 (1943).

Where the evidence was conflicting as to whether the employee's death was due from poisoning from food eaten at employer's boarding house or from diabetes, the court would not disturb the order of the board denying compensation. *Cameron v. Bradley Mining Co.*, 66 Idaho 409, 160 P.2d 461 (1945).

Since the record failed to disclose that respondent's blindness was superinduced other than through an accidental injury and there was no evidence that it was caused by Harada's disease, there was no alternative other than to affirm the award. *Wells v. Potlatch Forests, Inc.*, 67 Idaho 415, 183 P.2d 202 (1947).

The supreme court was not a fact-finding body in compensation cases; its only function was to determine whether there was sufficient substantial evidence before board to sustain its conclusions of fact. *Walker v. Hogue*, 67 Idaho 484, 185 P.2d 708 (1947).

The credit and weight to be given to the testimony in industrial accident proceedings were for the industrial accident board and the board's findings were conclusive upon appeal if supported by competent evidence. *Miller v. State*, 69 Idaho 122, 203 P.2d 1007 (1949); *Dawson v. Potlatch Forests, Inc.*, 82 Idaho 406, 353 P.2d 765 (1960); *In re Sutton*, 83 Idaho 265, 361 P.2d 793 (1961).

Where there was substantial evidence to support finding of board, though evidence was conflicting, finding by board that condition of

claimant's leg resulting in amputation, was not due to an accident in the employment, but was the result of disease of diabetes, will be sustained by the court on appeal. *Johansen v. Ferry-Morse Seed Co.*, 69 Idaho 275, 206 P.2d 545 (1949).

Supreme court in reviewing action of industrial accident board would only determine whether findings of board were supported by competent and substantial evidence. *Smith v. Potlatch Forests, Inc.*, 74 Idaho 470, 264 P.2d 684 (1953).

The findings and conclusions made by the board that deceased died from natural causes, not from an accidental personal injury, were based on substantial evidence, sufficient to support such findings and conclusions and hence could not be disturbed on appeal. *Darvell v. Wardner Indus. Union*, 78 Idaho 309, 302 P.2d 950 (1956).

Where there was a substantial conflict in the evidence as to whether deceased received an injury and occupational disease caused by an accident arising out of and in the course of his employment and that death did result therefrom, the findings of the industrial board would not be disturbed. *Moeller v. Volco Bldrs.' Supply, Inc.*, 81 Idaho 349, 341 P.2d 447 (1959).

Finding of the industrial accident board would not be disturbed on appeal where secondary evidence supporting such finding became primary when it was admitted without objection. *Clevenger v. Potlatch Forests, Inc.*, 82 Idaho 406, 353 P.2d 396 (1960).

The industrial accident board properly concluded from the evidence that claimant did not sustain the burden of proving by preponderance of the evidence that death of employee who was suffering from carcinoma of the esophagus and a heart condition was precipitated or contributed to by accidental injury suffered during employment. *Dawson v. Potlatch Forests, Inc.*, 82 Idaho 406, 353 P.2d 765 (1960).

If the order of the industrial accident board was clearly unsupported as a matter of law, it was within the province of the supreme court to set it aside. *Duncan v. Jacobsen Constr. Co.*, 83 Idaho 254, 360 P.2d 987 (1961); *Beutler v. MacGregor Triangle Co.*, 85 Idaho 415, 380 P.2d 1 (1963); *Comish v. J. R. Simplot Fertilizer Co.*, 86 Idaho 79, 383 P.2d 333 (1963).

The rule that doubtful workmen's compensation cases should be resolved in favor of the awarding of compensation did not apply to a review of industrial accident board's findings of fact which were supported by substantial, competent evidence. *Bennett v. Bunker Hill Co.*, 88 Idaho 300, 399 P.2d 270 (1965).

The rule that positive testimony was entitled to more weight than negative testimony did not apply to the appellate court's examination of the record of proceedings in a work-

men's compensation case. The weight to be given the testimony, the credibility of the witnesses and the reasonable conclusions and inferences to be derived from the record were peculiarly within the province of the board, and not of this court. *Bennett v. Bunker Hill Co.*, 88 Idaho 300, 399 P.2d 270 (1965).

Where the claimant received a disabling back injury in 1960 while working for one employer and another in 1963 while working for another employer and had received several nondisabling back injuries prior to 1960 and surgeons who treated him for the 1963 injury testified that the injuries prior to 1960 had not contributed to his disability, an award of the industrial accident board apportioning compensation between the 1960 and 1963 injuries would not have been reversed because of its finding that there was no competent evidence to justify a finding that the pre-1960 injuries contributed to his disability. *Cook v. Roland T. Romrell Co.*, 90 Idaho 155, 409 P.2d 104 (1965).

Where medical experts disagreed as to whether physical exertion of a man suffering from acute myocardial infarction caused a coronary thrombosis or occlusion from which he died, the finding of the industrial accident board that his death was not from an accident arising out of his employment would not be set aside on appeal. *Bradshaw v. Bench Sewer Dist.*, 90 Idaho 557, 414 P.2d 661 (1966).

The decision of the board denying compensation for the death of an employee from the bursting of an aneurysm on an artery in his brain, which bursting occurred while the decedent was on the job, was sufficiently supported where the record contained no evidence as to what the decedent was doing at the time of the bursting and medical evidence disagreed as to the probable cause of the rupture, but there was some medical testimony that the rupture would have happened eventually and might have happened at any time regardless of the decedent's activity. *Tipton v. Jansson*, 91 Idaho 904, 435 P.2d 244 (1967).

With conflicting evidence as to the date the disabling accident occurred, as to which accident was the cause of the claimant's disability, and as to when the claimant became mentally incompetent, findings of the board that the claim was barred by failure to file within one year, that the statute of limitations was not tolled by the claimant's mental incompetency, and that his disability was not caused by the accident upon which his claim was based could not be reviewed on appeal to the supreme court. *Gregg v. Orr*, 92 Idaho 30, 436 P.2d 245 (1967).

Evidence that claimant, when injured, was engaged in excavating at a mining site for the operation of which a mining corporation was later incorporated, with equipment belonging



to a construction company, under direction of officers of the construction company who also became officers of the mining company, that he was paid by officers of the construction company who were later reimbursed by the company, and that his report of injury was signed by the president of the construction company as such president was sufficient to sustain the industrial accident board's finding that the claimant was an employee of the construction company at the time of his injury. *Atkins v. C. B. Eaton & Sons, Inc.*, 92 Idaho 172, 438 P.2d 917 (1968).

Although the findings of fact of the indus-

trial accident board, if they were supported by substantial, competent evidence, were binding on the court, it was within the province of the court to set aside an award not supported as a matter of law. *Spanbauer v. Peter Kiewit Sons' Co.*, 93 Idaho 509, 465 P.2d 633 (1970).

Order of Industrial Accident Board would not be set aside where appellants failed to establish from the facts any material conflict between the record and the findings of the board and the findings were supported by substantial, competent evidence. *Clark v. Sage*, 95 Idaho 79, 502 P.2d 323 (1972).

**72-733. Limited jurisdiction of courts.** — Except as herein provided, no court of this state shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any order or award of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its duties. [I.C., § 72-733, as added by 1971, ch. 124, § 3, p. 422.]

#### JUDICIAL DECISIONS

##### **Exclusive Jurisdiction of Commission.**

An employee's action against the Industrial Commission and the Insurance Fund and several of their respective employees alleging that she was injured in an industrial accident and received an inadequate award for those injuries was properly dismissed as district

courts are expressly forbidden to exercise any jurisdiction in any cause seeking to in any way interfere with the actions or jurisdiction of the Industrial Commission. *West v. State*, 112 Idaho 1038, 739 P.2d 337 (1987).

**Cited in:** *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

**72-734. Interest on compensation awards.** — Whenever a decision shall have been entered by the commission awarding compensation of any kind to a claimant, such award shall accrue and the employer shall become liable for, and shall pay, interest thereon from the date of such decision pursuant to the rates established and existing as of the date of such decision, pursuant to section 28-22-104(2), Idaho Code. Such interest shall accrue on all compensation then due and payable, and on all compensation successively becoming due thereafter, from the respective due dates, regardless of whether an appeal shall be taken from the decision of the commission, until the time of payment thereof. [I.C., § 72-734, as added by 1981, ch. 262, § 2, p. 558.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-734 (I.C., § 72-734, as added by 1971, ch. 124, § 3, p. 442), was repealed by S.L. 1981, ch. 262, § 1.

#### JUDICIAL DECISIONS

**Cited in:** *Bingham County Comm'n v. Interstate Elec. Co.*, 108 Idaho 181, 697 P.2d 1195 (Ct. App. 1985).

**72-735. Enforcement of award — Filing in district court — Duty of court to enter judgment.** — (1) In the event of default in payment of compensation due under an award and on or after the 30th day from the date upon which compensation became due, any party in interest may file in the district court for the county in which the injury or disease occurred if such occurred within the state, otherwise in the district court for the county in which the employer resides, a certified copy of the decision of the commission awarding compensation from which no appeal has been taken within the time allowed therefor, or a certified copy of the memorandum of agreement approved by the commission, and thereupon the court without notice shall render a decree or judgment in accordance therewith and cause the parties to be notified thereof.

(2) In case the employer maintains no place of business in this state, he shall be deemed to have appointed the secretary of state his agent for the purpose of acceptance of notice of entry of such decree or judgment and the secretary of state shall take reasonable steps to give actual notice thereof to the employer.

(3) The fee required to be paid to the clerk of the district court for the filing of the petition or entry of such decree or judgment and for any enforcement procedure thereupon shall be the same as that provided by law for appeals to the district court from inferior tribunals. [I.C., § 72-735, as added by 1971, ch. 124, § 3, p. 422.]

#### STATUTORY NOTES

**Cross References.** — Agreement of parties enforceable hereunder, § 72-711.

Awards by hearing member enforceable hereunder, § 72-716.

Decisions of board enforceable, § 72-707.

Revision of district court judgment upon modification, § 72-737.

#### JUDICIAL DECISIONS

**Cited in:** Brannon v. Pike, 112 Idaho 938, 737 P.2d 459 (1987).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Attorney's lien.

Construction and application.

Enforcement by administrators.

Interest.

#### Attorney's Lien.

Under former § 43-1410, a judgment based on an award of the Industrial Accident Board had the same effect as any other judgment, and § 3-205 gives an attorney a lien upon the judgment. Renfro v. Nixon, 55 Idaho 532, 45 P.2d 595 (1935), overruled in part, Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

#### Construction and Application.

The statute applied only in cases where no appeal had been taken and was only intended

to confer power on district court to enforce award where aggrieved party had failed to appeal. Ybaibarriaga v. Farmer, 39 Idaho 361, 228 P. 227 (1924); Cain v. C. C. Anderson Co., 65 Idaho 443, 145 P.2d 483 (1944); Haines v. State Ins. Fund, 65 Idaho 450, 145 P.2d 833 (1944).

#### Enforcement by Administrators.

Where an employee's widow was granted an award, the amount accrued and unpaid at her death belonged to her estate and her admin-



istrator might proceed to enforce payment in the manner provided by the statute. *State Ins. Fund v. Hunt*, 52 Idaho 639, 17 P.2d 354 (1932).

#### **Interest.**

The district court was without authority to

enter judgment ordering interest payment on death compensation instalment not in arrears. *Cain v. C.C. Anderson Co.*, 67 Idaho 1, 169 P.2d 505 (1946).

**72-736. District court judgment nonappealable — A lien upon execution.** — The decree or judgment from the district court entered pursuant to section 72-735, shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though said decree or judgment had been rendered in an action duly heard and determined by said court, and shall with like effect be entered and docketed, except that there shall be no appeal therefrom and the same shall not constitute a lien upon the real property of the employer until recorded as any other judgment. [I.C., § 72-736, as added by 1971, ch. 124, § 3, p. 422.]

### **JUDICIAL DECISIONS**

#### **DECISIONS UNDER PRIOR LAW**

#### **Appeal.**

An appeal did not lie from district court judgment. *Ybaibarriaga v. Farmer*, 39 Idaho 361, 228 P. 227 (1924).

Where a judgment for claimant was entered in the district court upon a certified copy of an award of the industrial accident board, after the award had been affirmed by the Supreme Court, no appeal lay from such a judgment. *Cain v. C. C. Anderson Co.*, 65 Idaho 443, 145 P.2d 483 (1944).

If the question of the district court's jurisdiction to enter a judgment enforcing a workmen's compensation award was involved, an application may have been made for a writ of review. *Haines v. State Ins. Fund*, 65 Idaho 450, 145 P.2d 833 (1944).

The Workmen's Compensation Act provision making the judgment of the district court respecting the enforcement of a workmen's compensation award final, and prohibiting appeal therefrom, could not be evaded by the indirect method of appealing from an order denying a motion to set aside the nonappealable judgment entered pursuant to

the terms of the Workmen's Compensation Act and prohibiting appeal therefrom. *Haines v. State Ins. Fund*, 65 Idaho 450, 145 P.2d 833 (1944).

An appeal did not lie from the district court order denying a motion of the state insurance fund, as surety, to set aside a judgment of the district court to enforce a compensation award where no appeal was taken from the award and the statutory time therefor had expired; the remedy being by application to the industrial accident board for the correction of the award allegedly procured by fraud. *Haines v. State Ins. Fund*, 65 Idaho 450, 145 P.2d 833 (1944).

Where the board, in awarding compensation for temporary total disability, reserved the determination of claimant's request for attorney's fees until the final disposition of the claim and had made no finding as to whether the employer contested the claimant's claim on reasonable ground, the Supreme Court referred the matter of attorney's fees to the board for determination as a factual issue. *Wilson v. Gardner Associated, Inc.*, 91 Idaho 496, 426 P.2d 567 (1967).

**72-737. Revision of district court's judgment upon modification of award by commission.** — The district court, upon the filing with it of a certified copy of a decision of the commission ending, diminishing or increasing compensation previously awarded, shall revoke or modify its prior decree or judgment so it will conform to said decision. [I.C., § 72-737, as added by 1971, ch. 124, § 3, p. 422.]

## CHAPTER 8

## MISCELLANEOUS PROVISIONS

## SECTION.

- 72-801. False representation a misdemeanor — Forfeiture of compensation.
- 72-802. Compensation not assignable — Exempt from execution.
- 72-803. Claims of attorneys and physicians and for medical and related services — Approval.

## SECTION.

- 72-804. Attorney's fees — Punitive costs in certain cases.
- 72-805. Law not retroactive.
- 72-806. Notice of change of status.

**72-801. False representation a misdemeanor — Forfeiture of compensation.** — If, for the purpose of obtaining any benefit or payment under the provisions of this law, either for himself or for any other person, any one wilfully makes a false statement or representation, he shall be guilty of a misdemeanor and upon conviction for such offense he shall forfeit all right to compensation under this law. [I.C., § 72-801, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Cross References.** — Falsification of payroll report to state insurance fund, § 72-923. Misrepresentation of the amount of premium tax, § 72-527.

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled herein as §§ 72-101 — 72-804.

## JUDICIAL DECISIONS

## ANALYSIS

Double jeopardy.  
False statement.

**Double Jeopardy.**

The reimbursement requirements of this section are in the nature of a civil forfeiture. Reimbursement under this section clearly bears a legitimate remedial purpose: the repayment of money to which the employee was never entitled. In addition, reimbursement bears a rational relationship to that purpose. Thus, the imposition of a criminal punishment under § 41-293 and reimbursement under this section does not constitute double jeopardy in violation of the United States Constitution's Double Jeopardy Clause, or the Idaho Constitution. *Berglund v. Potlatch Corp.*, 129 Idaho 752, 932 P.2d 875 (1996).

**False Statement.**

Where the employee did not dispute the Commission's factual findings that his testimony was inconsistent, that he was not a credible witness, and that he did not sustain a compensable work-related injury and these determinations were made independently of the criminal conviction under § 41-293, they provided a sufficient basis for the Commission's finding that the employee wilfully made a false statement or representation for the purpose of obtaining workers' compensation benefits. *Berglund v. Potlatch Corp.*, 129 Idaho 752, 932 P.2d 875 (1996).

**72-802. Compensation not assignable — Exempt from execution.** — No claims for compensation under this law shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors, except the restrictions under this section shall not apply to enforcement of an order of any court for the support of any person by execution, garnishment or wage withholding under chapter 12, title 7, Idaho Code. [I.C., § 72-802, as added by 1971, ch. 124, § 3, p. 422; am. 1985, ch. 159, § 5, p. 417.]



## STATUTORY NOTES

**Compiler's Notes.** — The words “this law” refer to S.L. 1971, ch. 124, compiled herein as §§ 72-101 — 72-804.

## JUDICIAL DECISIONS

### Garnishment of Workers' Compensation Benefits.

Where injured worker received a lump sum settlement of workers' compensation benefits, and worker owed child support and arrearages from two previous marriages and support obligations for the care of another child, the exemption provision of this section, which exempts all workers' compensation awards from creditors claims did not apply to claims for the enforcement of support orders as § 7-1203 granted the Department of Health and Welfare, Bureau of Child Support

Enforcement (Department) garnishment rights and other remedies against the proceeds of worker's compensation awards. Under former § 7-1204, § 11-207 limited garnishment by the Department to 55% of the workers' compensation lump sum settlement benefits payable to the injured worker child support obligor. State Dep't of Health & Welfare ex rel. Lisby v. Lisby, 126 Idaho 776, 890 P.2d 727 (1995).

**Cited in:** Barnett v. Eagle Helicopters, Inc., 123 Idaho 361, 848 P.2d 419 (1993).

## RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, §§ 667, 668.

**C.J.S.** — 100 C.J.S., Workers' Compensation, §§ 730, 731.

**A.L.R.** — Construction and effect of statutory exemptions of proceeds of workmen's compensation awards. 31 A.L.R.3d 532.

**72-803. Claims of attorneys and physicians and for medical and related services — Approval.** — Claims of attorneys and claims for medical services and for medicine and related benefits shall be subject to approval by the commission; provided however, that fees for physician services shall be set using relative value units from the current year resource based relative value system (RBRVS) as it is modified from time to time, multiplied by conversion factors to be determined by the commission in rule. Factors will be set for, at least, the following CPT code areas: medicine, surgery, physical medicine, radiology, anesthesia and pathology. The fees shall be adjusted each year using the same methodology as set forth in section 56-136, Idaho Code. In cases where RBRVS units are not available or have no relation to industrial claims, relative value units for fees for physician services shall be determined by the commission. Initial conversion factors shall be determined by the commission no later than January 1, 2006, to be effective April 1, 2006. [I.C., § 72-803, as added by 1971, ch. 124, § 3, p. 422; am. 2005, ch. 371, § 1, p. 1186.]

## JUDICIAL DECISIONS

### ANALYSIS

Attorney fees.

— Actions of commission beyond authority.

— Calculating garnishment.

— Evidence.

— Guidelines.

Commission's authority.

Construction.

Regulation of attorney fees.

### Attorney Fees.

This section and §§ 72-210 and 72-804 evince a general legislative scheme whereby attorney fee issues closely related to the substance of the workers' compensation claims are due to be resolved by the Industrial Commission. *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

In view of the uniquely broad grant of original and exclusive jurisdiction over workers' compensation matters given to the Industrial Commission, and the fact that this section confers upon the commission the jurisdiction to resolve claims for attorney fees, there exists a legislative intent that jurisdiction over claims by a client against his attorney arising out of their fee agreement in a workers' compensation case is properly with the Industrial Commission, and not the district court. *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

The Industrial Commission acted within its authority in approving worker's attorney a lien against the award of medical expenses. *St. Alphonsus Reg'l Med. Ctr. v. Edmondson*, 130 Idaho 108, 937 P.2d 420 (1997).

### —Actions of Commission Beyond Authority.

In acting beyond the bounds of its statutory authority by sua sponte modifying appellants' uncontested attorney fee agreements the commission has acted arbitrarily and capriciously and has manifestly abused its discretion. These abuses have bred discomfort and uncertainty in appellants and other attorneys. Without clear guidelines nestled in appropriately promulgated regulations, attorneys' actions are plagued by doubt, which may have a chilling effect on the underlying purpose of the Workers' Compensation Act that the commission is constrained to promote under § 72-508. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

In sua sponte reducing appellants' uncontested attorney fee agreements without suitable advance notice to all of the parties directly involved, accomplished through properly enacted regulations, and without a meaningful hearing, the commission has acted in disregard of important constitutional mandates. The net result of the commission's sua sponte conduct is a deprivation of appellants' property rights under the fee agreement without due process of law. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

### —Calculating Garnishment.

Where injured worker received a lump sum settlement of workers' compensation benefits, and worker owed child support and arrearages from two previous marriages and support obligations for the care of another child, the district court erred in holding that attorney fees deducted from the lump sum

settlement agreement must be added back into the settlement amount before garnishment percentage under § 11-207 was taken, for pursuant to this section, claims for attorney fees were subject to approval by the Industrial Commission and since the commission had approved the lump sum agreement in its order and had also approved and awarded the attorney fees, the attorney fees were not part of the lump sum award and were not subject to the provisions of § 11-207. *State Dep't of Health & Welfare ex rel. Lisby v. Lisby*, 126 Idaho 776, 890 P.2d 727 (1995).

### —Evidence.

Substantial and competent evidence existed to support the Industrial Commission's order denying an attorney's motion for reconsideration of the Commission's previous order partially denying the attorney's request for attorney's fees, as the attorney did not show that his efforts "primarily or substantially" secured the PPI award for his client in that it was the injured worker's doctor who initiated the determination of the worker's PPI rating. *Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998).

Denial of attorney fees was proper where the testimony supported the conclusion that any work employee's attorney did was directed at encouraging employer to accept full responsibility for the medical bills related to two surgeries, which they questioned but fully accepted immediately after consulting with outside counsel, and not as a result of anything employee's attorney did. *Johnson v. Boise Cascade Corp.*, 134 Idaho 350, 2 P.3d 735 (2000).

### —Guidelines.

Without properly enacted guidelines it is impossible for the commission to exercise its duty to approve undisputed attorney fees under this section. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

In effecting the attorney fee modifications under the claimed authority of this section where there is no fee dispute, the commission is acting in its quasi-legislative as opposed to its quasi-judicial capacity. The commission must accordingly act within the bounds of its legislatively delegated authority and of the omnipresent mantle of the United States Constitution. In sua sponte modifying the appellants' uncontested attorney fees absent the guidelines of a properly enacted regulatory scheme, the commission infringed both perimeters. *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993).

### Commission's Authority.

The Industrial Commission has the authority to administer this section, and to issue regulations necessary to bring about secure relief for injured workers and their families.



Rhodes v. Indus. Comm'n, 125 Idaho 139, 868 P.2d 467 (1993).

#### **Construction.**

The absence of the word "regulate" in this section is not legally significant and does not exact a reading that the legislature intended to confine the Industrial Commission's regulatory authority; accordingly, the word "approve" is sufficient to establish the proper delegation of the power to regulate attorney fees. Rhodes v. Indus. Comm'n, 125 Idaho 139, 868 P.2d 467 (1993).

#### **Regulation of Attorney Fees.**

The language of this section contemplates that the Industrial Commission will monitor the appropriateness of fees on behalf of claimants, and therefore a regulation restricting the amount of legal fees recoverable by an

attorney representing injured workers, provides a reasonable interpretation of the power vested by this section. Rhodes v. Indus. Comm'n, 125 Idaho 139, 868 P.2d 467 (1993).

There is a rational relationship between the legitimate legislative purpose to foster sure relief for injured workers and the attorney fee regulation promulgated by the Industrial Commission; the regulation does not violate the equal protection or due process clauses of the United States or Idaho Constitutions. Rhodes v. Indus. Comm'n, 125 Idaho 139, 868 P.2d 467 (1993).

**Cited in:** Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 102 Idaho 744, 639 P.2d 442 (1981); Smith v. Payette County, 105 Idaho 618, 671 P.2d 1081 (1983); Boise Orthopedic Clinic v. Idaho State Ins. Fund, 128 Idaho 161, 911 P.2d 754 (1996).

### DECISIONS UNDER PRIOR LAW

#### **Attorney's Lien.**

An attorney had lien on award under § 3-205. Renfro v. Nixon, 55 Idaho 532, 45 P.2d

595 (1935), overruled in part, Frazee v. Frazee, 104 Idaho 463, 660 P.2d 928 (1983).

**72-804. Attorney's fees — Punitive costs in certain cases.** — If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission. [I.C., § 72-804, as added by 1971, ch. 124, § 3, p. 422.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-804.

### JUDICIAL DECISIONS

#### ANALYSIS

Attorney fees.  
Attorney's fees on appeal.  
Basis of award.  
Contingency fee.  
Continuing request.  
Jurisdiction.  
Legislative intent.

Purpose.  
 Reasonable grounds for non-payment.  
 Resolution by industrial commission.  
 Right to attorney's fees.  
 Substantial evidence.  
 Surety.  
 Unauthorized against claimant.  
 Unreasonable grounds for appeal.

### Attorney Fees.

Idaho industrial commission erred by denying an award of attorney's fees to an employee, after it had determined that the employer's denial of benefits was unreasonable, because it ignored the directive in § 72-804 and failed to consider the *Hogaboom* factors. *Bradley v. Wash. Group Int'l*, 141 Idaho 655, 115 P.3d 746 (2005).

### Attorney's Fees on Appeal.

Where there was no serious contention that the claimant was 100 percent disabled, but the sole issue was what allocation of compensation should be made between the state industrial special indemnity fund and claimant's employer and its surety, the claimant was awarded attorney fees on his appeal since the fund and the surety could have made arrangements to compensate the claimant and litigate the allocation issue themselves without causing him to hire his own counsel for appeal. *Curtis v. Shoshone County Sheriff's Office*, 102 Idaho 300, 629 P.2d 696 (1981).

Where it was not unreasonable for employer to raise on appeal the effect of an injured worker's incarceration in the state penitentiary upon his award of permanent disability, claimant's request for attorney fees was denied. *Yardley v. Chuck's Freezer Meats*, 123 Idaho 221, 846 P.2d 223 (1993).

Injured worker's claims that employer's workers' compensation surety had breached their duty of good faith and fair dealing and had breached their fiduciary duty by initially refusing to satisfy appellant's workers' compensation claims were held by the Supreme Court to be claims arising under this section as worker's claims related to the premises for an award of attorney fees pursuant to this section. *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

Where the employer and surety were merely asking the court to reweigh the evidence presented to the commission, attorney fees and costs on appeal were appropriate. *Wuthrich v. Terteling Co.*, 135 Idaho 593, 21 P.3d 915 (2001).

Attorney fees and costs are properly awarded when an appeal asks the supreme court to do nothing more than reweigh the evidence submitted to the Idaho industrial commission. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 40 P.3d 91 (2002).

Attorney fees and costs were properly awarded when employer's appeal asked the supreme court to do nothing more than reweigh the evidence submitted to the commission. *Spivey v. Novartis Seed Inc.*, 137 Idaho 29, 43 P.3d 788 (2002).

Workers' compensation claimant was not entitled to attorney fees on appeal, where the claimant only prevailed in part in the appeal. *Hoskins v. Circle A Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003).

Because the claim for workers' compensation benefits had not been resolved, and a remand to the Idaho industrial commission was necessary, the determination of whether the employer had contested the claimant's claim without reasonable ground was left to the discretion of the commission, and if the commission found in favor of the claimant and awarded benefits, the commission could then determine if attorney fees based on the appeal were warranted. *Page v. McCain Foods, Inc.*, 141 Idaho 342, 109 P.3d 1084 (2005).

Court rejected the employee's request for attorney fees in the employer's surety's appeal of the Industrial Commission's decision apportioning the employee's disability between the employer and Industrial Special Indemnity Fund (ISIF) because the issue of whether the Carey apportionment formula should have been modified to expressly consider a pre-existing permanent partial disability (PPD) rating was an issue of first impression. *Clark v. Idaho Truss, — Idaho —*, 128 P.3d 941 (2006).

### Basis of Award.

Where industrial commission had approved a claimant's contingent fee agreement with his attorney which provided for 35 percent, or about \$11,000, as a reasonable attorney fee, but awarded an attorney's fee of \$2,500 because the claim had been contested by the employer's surety without reasonable grounds, the award was reversed and remanded to the commission since it was not clear on whether the award was made on a fixed fee or contingent basis and the commission had only considered the time and effort expended rather than all possible relevant factors. *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981).

A decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the industrial com-



mission. *Lopez v. Amalgamated Sugar Co.*, 107 Idaho 590, 691 P.2d 1205 (1984).

Since there were no reasonable grounds upon which employer's application of hearing could have been brought, attorney fees should only be based upon a percentage of compensation paid from the time employer's application for hearing was filed. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

Since hearing before commission was brought without reasonable ground, the appeal was also brought without reasonable ground, with the exception of the slight modification of the attorney fee award, accordingly, court awarded attorney fees on appeal pursuant to this section. *Kirkpatrick v. Transtector Sys.*, 114 Idaho 559, 759 P.2d 65 (1988).

This section does not make the award of attorney's fees contingent on fulfillment of some procedures of the industrial commission. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

The industrial commission concluded that Idaho case law relating to the "special errand" exception to the going-and-coming rule was not definitive and that the rule proposed by the claimant provided the appropriate test. That test required the industrial commission to weigh the evidence regarding each of five factors, not all of which were favorable to the claimant, in order to decide whether the claimant was within the course and scope of her employment. After that weighing and balancing, the commission concluded that the factual and legal issues raised were not unreasonable and therefore denied the claimant's motion for attorney fees. *Trapp v. Sagle Volunteer Fire Dep't*, 122 Idaho 655, 837 P.2d 781 (1992).

Where an employer's arguments as to the existence of the impairment and the extent of claimant's disability were nothing but efforts to have the Supreme Court reweigh evidence on appeal and where employer's contention that § 72-403 barred recovery by claimant was utterly without merit, an award of attorney fees to claimant was appropriate. *Baker v. Louisiana Pac. Corp.*, 123 Idaho 799, 853 P.2d 544 (1993).

This section applies only where unreasonable conduct appears, and an award of attorney fees in a worker's compensation case must be deemed compensation to the injured employee and not as a penalty against the employer or surety. *Dennis v. School Dist. 91*, 135 Idaho 94, 15 P.3d 329 (2000).

Key to § 72-804, which governs the award of attorney fees in proceedings before the Idaho industrial commission, is that there is no reasonable grounds for the contesting or denial of the award. *Hoskins v. Circle A*

*Constr., Inc.*, 138 Idaho 336, 63 P.3d 462 (2003).

### **Contingency Fee.**

A fee arrangement, which provides that the attorney would receive 33 1/3% of any amount received through his efforts or attorney fees awarded by the court, does not limit the industrial commission to the terms of the contingency fee in its award of reasonable attorney's fees; such a limitation would frustrate the representation element of this section by restricting the ability of injured claimants to retain competent counsel. *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

In awarding reasonable attorney's fees pursuant to this section, the industrial commission need not be constrained by the contingent fee agreement in effect between the claimant and his attorney in the presence of a clause providing for the alternative of awarded attorney's fees. In such a case, as in the case of all awards of attorney's fees, the commission must arrive at a reasonable award considering not only the factors cited in *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981), but the legislative intent behind the Workmen's Compensation Laws in general and this section in particular. *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

### **Continuing Request.**

An employee's right to attorney's fees pursuant to a specific statutory provision is not to be controlled by a technical interpretation of the rules of the industrial commission, and where an employee claimed attorney's fees in his first pleading, where his right to attorney's fees was dependent on the commission's determination with regard to whether the employer's surety had discontinued the employee's compensation for total temporary disability without reasonable grounds, and where the issue of the employee's entitlement to more compensation for total temporary disability remained in the statement of issues throughout the proceedings, this was sufficient to entitle the employee to have his claim for attorney's fees considered when he was awarded further compensation for his temporary disability even though he did not continue to expressly request attorney's fees throughout the proceedings. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

### **Jurisdiction.**

Where injured worker appellant and spouse appealed the decision of the trial court dismissing their claims against the Idaho Department of Transportation's worker's compensation surety (SIF) for lack of subject matter jurisdiction and dismissing their

waiver of subrogation claim against SIF pursuant to § 72-223(3) because of SIF's pending action against the appellant's attorney, the Supreme Court held that appellants presented claims arising under this section and that under § 72-707 the industrial commission had exclusive jurisdiction of all questions arising under the workers' compensation law. *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

### **Legislative Intent.**

The legislature did not intend that a worker should be able to bring a bad faith tort action against his employer's surety in courts of general jurisdiction, but rather that a worker could receive attorney fees and sometimes punitive costs if the employer or surety acted unreasonably. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

### **Purpose.**

The purpose of enacting the Workmen's Compensation Laws in Idaho was to provide sure relief for injured workers and their dependents. In providing for the payment of attorney's fees in certain cases, the legislature sought to further this purpose in several ways: first, the legislature sought to encourage claimants to press claims which, but for such provision, would not be worth their time and effort once the costs of hiring of attorney had been deducted from the award; and second, the legislature meant to encourage attorneys to represent clients and take on claims which would otherwise not be in their best financial interests due to their relative financial insignificance. *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984).

### **Reasonable Grounds for Non-Payment.**

Where employer's insurance company notified claimant's physician pursuant to § 72-806 when it forwarded to the physician a copy of the first medical panel's report which contained that panel's recommendations, the insurance company did not act unreasonably when it stopped payment of claimant's medical expenses following the first panel's examination; therefore, claimant was not entitled to an award of attorney's fees under this section. *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 712 P.2d 621 (1985).

The industrial commission did not abuse its discretion in finding that surety did not act unreasonably in failing to pay workers' compensation claimant's medical bills because claimant did not specify the medical bills for which payment was requested and did not link those bill to claimant's occupational disease. *Hoye v. Daw Forest Prods., Inc.*, 125 Idaho 582, 873 P.2d 836 (1994).

### **Resolution by Industrial Commission.**

In view of the uniquely broad grant of original and exclusive jurisdiction over work-

ers' compensation matters given to the industrial commission, and the fact that § 72-803 confers upon the commission the jurisdiction to resolve claims for attorney fees, there exists a legislative intent that jurisdiction over claims by a client against his attorney arising out of their fee agreement in a workers' compensation case is properly with the industrial commission, and not the district court. *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

This section and §§ 72-210 and 72-803 evince a general legislative scheme whereby attorney fee issues closely related to the substance of the workers' compensation claims are due to be resolved by the industrial commission. *Brannon v. Pike*, 112 Idaho 938, 737 P.2d 459 (1987).

There is nothing in either this section or prior court decisions that prevents the industrial commission from concluding, in the exercise of its discretion, that a reasonable attorney fee in a particular case is a percentage of the benefits awarded. Therefore, the commission did not err in deciding to award attorney fees based upon a percentage of the benefits awarded rather than upon the time spent by the attorney in representing the claimant. *Swett v. St. Alphonsus Reg'l Med. Ctr.*, 136 Idaho 74, 29 P.3d 385 (2001).

Although the industrial commission must consider the factors listed in *Hogaboom v. Economy Mattress*, 107 Idaho 13, 684 P.2d 990 (1984), along with any other relevant factors when fixing the amount of attorney fees to be awarded under this section, commission is not required to specifically address each factor, nor is it required to make specific findings showing how each factor entered into its decision. *Swett v. St. Alphonsus Reg'l Med. Ctr.*, 136 Idaho 74, 29 P.3d 385 (2001).

### **Right to Attorney's Fees.**

Attorney's fees are not a matter of right under workmen's compensation law but may only be recovered under the circumstances set out in statute. *Troutner v. Traffic Control Co.*, 97 Idaho 525, 547 P.2d 1130 (1976).

Where the record supported a finding that the employer, where it initially thought that the claimant's mother was not totally dependent on the decedent son, was unreasonable either in not then accepting liability for at least a claim based on partial dependency or in not investigating further in order to ascertain that only the decedent was employed and hence at the time the sole support of his mother, and nothing was presented by the employer to show claimant's actual dependency upon anyone other than the decedent at the time of the decedent's death, the commission possessed the authority to award reasonable attorney fees. *Hayes v. Amalgamated Sugar Co.*, 104 Idaho 279, 658 P.2d 950 (1983).



Based upon the evidence, the employer's act of stopping payment on the claimant's workers' compensation benefits was not unreasonable and did not entitle the claimant to an award him attorney fees under § 72-804. *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005).

### **Substantial Evidence.**

Industrial commission's decision declining to award attorney fees was based upon substantial, competent evidence; the record showed that temporary total disability benefits were paid within a reasonable time after receipt of a written claim for compensation, that the surety timely paid certain medical expenses owing to a community hospital within a reasonable time after receipt of a written claim, and that knowing the claimant had an impairment rating based upon her medical examination, the surety paid the benefits within a reasonable time after receipt of a written claim for compensation. *Lorca-Merono v. Yokes Wash. Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002).

### **Surety.**

Where worker asked the court to construe the Industrial Special Indemnity Fund (ISIF) to be employer's surety under this statute, ISIF was not employer's surety in the sense that this section uses the term; ISIF does not insure the liability of the employer but rather the disability of the employee due to certain pre-existing physical impairments. *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), overruled on other grounds, *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 786 P.2d 557 (1990).

Where the defendant's allegation was that his employer's worker's compensation surety contested a claim for compensation without reasonable grounds, the allegation came within the terms of this section. *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999).

### **Unauthorized against claimant.**

The courts have no authority to award attorney fees against an unsuccessful work-

er's compensation claimant. *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995).

### **Unreasonable Grounds for Appeal.**

Where the surety had ample evidence available to it to show a direct cause and effect relationship between the accident in 1972 and the claimant's injury, and could not reasonably have believed that the claimant was not totally and permanently disabled, being informed as early as 1977 of the nature and extent of claimant's disability, and the surety's only real contention was the extent to which Industrial Special Indemnity Fund would be liable, but the surety in its application for a hearing raised the issue of the extent of the claimant's disability, which required the claimant to protect his interest by being represented by counsel, the commission did not abuse its discretion or err in awarding attorney fees to the claimant, and attorney fees would also be awarded for appeal. *Royce v. Southwest Pipe*, 103 Idaho 290, 647 P.2d 746 (1982).

**Cited in:** *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 591 P.2d 143 (1979); *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 639 P.2d 442 (1981); *Frazee v. Frazee*, 104 Idaho 463, 660 P.2d 928 (1983); *Smith v. Payette County*, 105 Idaho 618, 671 P.2d 1081 (1983); *DeWils Interiors, Inc. v. Dines*, 106 Idaho 288, 678 P.2d 80 (Ct. App. 1984); *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984); *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 686 P.2d 54 (1984); *Sweeney v. Great W. Transp.*, 110 Idaho 67, 714 P.2d 36 (1986); *Malueg v. Pierson Enters.*, 111 Idaho 789, 727 P.2d 1217 (1986); *Harrison v. Osco Drug, Inc.*, 116 Idaho 470, 776 P.2d 1189 (1989); *Cantu v. J.R. Simplot Co.*, 121 Idaho 585, 826 P.2d 1297 (1992); *Nelson v. David L. Hill Logging*, 124 Idaho 855, 865 P.2d 946 (1993); *Challis v. Louisiana-Pacific Corp.*, 126 Idaho 134, 879 P.2d 597 (1994); *Walters v. Industrial Indem. Co.*, 127 Idaho 933, 908 P.2d 1240 (1996); *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 918 P.2d 1192 (1996); *Tonahill v. Legrand Johnson Constr. Co.*, 131 Idaho 737, 963 P.2d 1174 (1998); *Duncan v. Navajo Trucking*, 134 Idaho 202, 998 P.2d 1115 (2000).

## **DECISIONS UNDER PRIOR LAW**

### **ANALYSIS**

#### **Costs.**

Failure of board to rule on attorneys' fees.

In general.

Right to attorneys' fees.

Unreasonable refusal to pay.

#### **Costs.**

Similar statute was not presumed to super-

sede general provisions for taxation of costs. *Brady v. Place*, 41 Idaho 747, 242 P. 314

(1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926); *Stoddard v. Mason's Blue Link Stores*, 55 Idaho 609, 45 P.2d 597 (1935).

#### **Failure of Board to Rule on Attorneys' Fees.**

While the industrial accident board did not consider and pass upon the claim of respondent for attorney's fees, it would be useless to send the cause back to the industrial accident board for further action in this respect as the case was one of first impression in this state and the evidence would not sustain a finding by the industrial accident board that defendants-appellants did not have reasonable grounds for contesting the claim. In *re Hillenbrand*, 80 Idaho 468, 333 P.2d 456 (1958).

Where board failed to find and conclude relative to issue of attorney fees, and case was remanded for further proceedings and a re-determination of compensation, court further directed that board consider the subject of attorney fees from standpoint of whether or not employer and surety contested claim without reasonable grounds. *Kiger v. Idaho Corp.*, 85 Idaho 424, 380 P.2d 208 (1963).

#### **In General.**

Awards of attorney fees in a proper case had to be deemed as compensation to the injured employee or survivors, and not a penalty. *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 457 P.2d 400 (1969).

#### **Right to Attorneys' Fees.**

In appeal where employee only obtained additional allowance for hospital and medical fees, he was not entitled to attorney's fees. *Jones v. Boise Produce & Comm. Co.*, 67 Idaho 287, 177 P.2d 157 (1947).

Claimant for compensation was not entitled to attorney fees on successful recovery of compensation where insurer contested payment on the ground that policy had been validly canceled prior to date of accident. *Passmore v. Austin*, 73 Idaho 484, 253 P.2d 800 (1953).

If employer resisted claim of alleged common law wife upon reasonable grounds the claimant was not entitled to attorney fees. *Foster v. Dieho Lumber Co.*, 77 Idaho 26, 287 P.2d 282 (1955).

Where employer's action in contesting claim was not without reasonable grounds, attorney's fees would not be awarded. *Burch*

*v. Potlatch Forests, Inc.*, 82 Idaho 323, 353 P.2d 1076 (1960).

Where the findings of fact and award of the board which reduced the amount payable by the surety to the claimant for partial permanent disability clearly showed that the surety had reasonable grounds for contesting the claim of the claimant, the claimant was not entitled to attorney fees. *Lane v. General Tel. Co.*, 85 Idaho 111, 376 P.2d 198 (1962), overruled on other grounds, *Christensen v. Calico Constr. & Dev. Co.*, 97 Idaho 327, 543 P.2d 1167 (1975).

Claimant was not entitled to an award of attorney's fees on the grounds that surety had contested a claim without reasonable grounds or had neglected or refused within a reasonable time to pay the compensation provided by law where, upon receipt of expense statements and appointment of administratrix, surety promptly paid expenses and the full temporary disability payments, even though surety had defended an action for a declaratory judgment as to its liability. *Martin Estate v. Woods*, 94 Idaho 870, 499 P.2d 569 (1972).

Claimant was granted attorney's fees on appeal of interim order of Industrial Accident Board by employer and carrier on basis that appeal was taken without reasonable grounds where appellants contested claim before Supreme Court without raising issues of law or of application of law to facts, the court noting that these issues had been resolved by a prior, unrelated decision, and appellants failed to identify any material conflict between findings of board and the record. *Clark v. Sage*, 95 Idaho 79, 502 P.2d 323 (1972).

#### **Unreasonable Refusal to Pay.**

There was an unreasonable refusal to pay compensation where an insurer, after an award of compensation by the industrial accident board, contended it was not the insurer of the employer, following which the employer sued and obtained a declaratory judgment of the status of such insurer of the employer. *Martin v. Argonaut Ins. Co.*, 91 Idaho 885, 434 P.2d 103 (1967).

It was inconsistent for the board to find that the surety was unreasonable in its denial of the claim, to approve as reasonable the agreement between claimant and her counsel, as to attorney's fees, and yet award a lesser amount as attorney's fees. *Mayo v. Safeway Stores, Inc.*, 93 Idaho 161, 457 P.2d 400 (1969).

### **RESEARCH REFERENCES**

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, §§ 663-666.

**C.J.S.** — 101 C.J.S., Workers' Compensation, § 1440 et seq.

**A.L.R.** — Workers' compensation: availability, rate, or method of calculation of interest on attorney's fees or penalties. 79 A.L.R.5th 201.



**72-805. Law not retroactive.** — The provisions of this law shall not apply to injuries received and occupational diseases manifested or to the compensation payable therefor prior to the taking effect of this law [January 1, 1972], except as in this law otherwise provided. [I.C., § 72-805, as added by 1971, ch. 124, § 3, p. 422.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this law" refer to S.L. 1971, ch. 124, compiled as §§ 72-101 — 72-805.

## JUDICIAL DECISIONS

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Completed transactions.  
Construction.  
Silicosis.

#### Completed Transactions.

A law was not retroactive because part of the factual situation to which it was applied occurred prior to its enactment, rather a law was retroactive only when it operated upon transactions which had been completed, or upon rights which had been acquired, or upon obligations which had existed prior to its passage. *Frisbie v. Sunshine Mining Co.*, 93 Idaho 169, 457 P.2d 408 (1969).

spective effect. *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923).

#### Silicosis.

Claim for death from silicosis denied, where allowance would amount to retroactive application of law. *Foote v. Hecla Mining Co.*, 62 Idaho 79, 108 P.2d 1030 (1940).

#### Construction.

Unless a contrary intention clearly appeared, a statute would not be given a retro-

**72-806. Notice of change of status.** — A workman shall receive written notice within fifteen (15) days of any change of status or condition including, but not limited to, the denial, reduction or cessation of medical and/or monetary compensation benefits, which directly or indirectly affects the level of compensation benefits to which he might presently or ultimately be entitled. If any change in compensation benefits is based upon a medical report or medical reports from any physician or any other practitioner of the healing arts, a copy of such report shall be attached to the written notice which the workman shall receive. The industrial commission shall by rule and regulation, determine by whom the notice shall be given and the form for such notice. In the absence of a rule governing a particular situation, the employer's insurer, or in the case of self-insurers, the employer, shall be responsible for giving the notice required herein. [I.C., § 72-806, as added by 1978, ch. 144, § 1, p. 325.]

## JUDICIAL DECISIONS

**Reasonable Grounds for Stopping Payment.**

Where employer's insurance company notified claimant's physician pursuant to this section when it forwarded to the physician a copy of the first medical panel's report which contained that panel's recommendations, the

insurance company did not act unreasonably when it stopped payment of claimant's medical expenses following the first panel's examination; therefore, the claimant was not entitled to an award of attorney's fees under § 72-804. *Poss v. Meeker Mach. Shop*, 109 Idaho 920, 712 P.2d 621 (1985).

## CHAPTER 9

## STATE INSURANCE FUND

## SECTION.

- 72-901. Board of directors of state insurance fund — Creation of state insurance fund.
- 72-902. State insurance manager — Powers and duties of state insurance manager.
- 72-903. Further statement of powers.
- 72-904. Power to sue and be sued.
- 72-905. Contracts.
- 72-906. Employment of assistants.
- 72-907. Personal liability.
- 72-908. Salaries, expenses and payment of same.
- 72-909. Delegation of powers.
- 72-910. State treasurer custodian of fund.
- 72-911. [Repealed.]
- 72-912. Investment of surplus or reserve.
- 72-912A. Appointment of investment managers.
- 72-913. Classification of risks and adjustment of premiums.

## SECTION.

- 72-914. Accounts.
- 72-915. Dividends.
- 72-916. [Repealed.]
- 72-917. Readjustment of payrolls.
- 72-918. Policies and payment of premiums.
- 72-919. Actions for collection in case of default — Penalty — Cancellation of policy.
- 72-920. Withdrawal from fund.
- 72-921. Reinsurance.
- 72-922. Audit of payrolls.
- 72-923. Falsification of payroll.
- 72-924. Wilful misrepresentation.
- 72-925. Inspections.
- 72-926. Disclosures prohibited.
- 72-927. Payment of compensation and re-funds.
- 72-928. Insurance by public corporations — Provision for Idaho national guard.
- 72-929. Maritime risk coverage.

**72-901. Board of directors of state insurance fund — Creation of state insurance fund.** — (1) There is hereby created as an independent body corporate politic a fund, to be known as the state insurance fund, for the purpose of insuring employers against liability for compensation under this worker's compensation law and the occupational disease compensation law and of securing to the persons entitled thereto the compensation provided by said laws. Such fund shall consist of all premiums and penalties received and paid into the fund, of property and securities acquired by and through the use of moneys belonging to the fund, and of interest earned upon moneys belonging to the fund and deposited or invested as herein provided.

Such fund shall be administered without liability on the part of the state. Such fund shall be applicable to the payment of losses sustained on account of insurance and to the payment of compensation under the worker's compensation law and the occupational disease compensation law and of expenses of administering such fund.

(2) The governor shall appoint five (5) persons to be the board of directors of the state insurance fund. One (1) member shall be a licensed insurance agent, one (1) member shall represent businesses of the state, one (1) member shall be a representative of labor, one (1) member shall be a



member of the state senate and one (1) member shall be a member of the state house of representatives. The governor shall appoint a chairman from the five (5) directors. The directors shall be appointed for terms of four (4) years, except that all vacancies shall be filled for the unexpired term, provided that the first two (2) appointments the governor makes after the effective date [April 3, 1998] of this act shall serve a term of two (2) years and the other three (3) members shall serve a term of four (4) years. Thereafter, a member shall serve a term of four (4) years. A certificate of appointment shall be filed in the office of the secretary of state. A majority of the members shall constitute a quorum for the transaction of business or the exercise of any power or function of the state insurance fund and a majority vote of the members shall be necessary for any action taken by the board of directors. The members of the board of directors shall appoint a manager of the state insurance fund who shall serve at their pleasure and such other officers and employees as they may require for the performance of their duties and shall prescribe the duties and compensation of each officer and employee. Members of the board of directors shall receive a compensation for service like that prescribed in section 59-509(h), Idaho Code.

(3) It shall be the duty of the board of directors to direct the policies and operation of the state insurance fund to assure that the state insurance fund is run as an efficient insurance company, remains actuarially sound and maintains the public purposes for which the state insurance fund was created.

(4) The state insurance fund is subject to and shall comply with the provisions of the Idaho insurance code, title 41, Idaho Code. For purposes of regulation, the state insurance fund shall be deemed to be a mutual insurer. The state insurance fund shall not be a member of the Idaho insurance guaranty association.

(5) Nothing in this chapter, or in title 41, Idaho Code, shall be construed to authorize the state insurance fund to operate as an insurer in other states. [1917, ch. 81, § 75, p. 252; compiled and reen. C.L. 256:75; C.S., § 6288; I.C.A., § 43-1701; am. 1939, ch. 251, § 1, p. 617; am. 1941, ch. 20, § 1, p. 37; am. 1998, ch. 428, § 1, p. 1346.]

### STATUTORY NOTES

**Cross References.** — A public corporation may elect to pay compensation out of current expense, § 72-314, but if it elects to procure security it must insure in the state insurance fund, § 72-928.

Industrial special indemnity fund, § 72-323.

Insurance in the state insurance fund is one of the alternative methods by which a private employer covered by the act must secure compensation, § 72-301.

**Effective Dates.** — Section 11 of S.L. 1998, ch. 428 declared an emergency. Approved April 3, 1998.

### JUDICIAL DECISIONS

#### ANALYSIS

Legislative intent.

Liability.

Mutual insurance carriers.

Nature of fund.

No judicial deference to SIF interpretation.

Powers of manager.

Property rights.

Status.

### **Legislative Intent.**

Despite its use of the term "mutual insurance company" in the state insurance fund statute, the legislature intended only to create a state managed insurance fund that operated, in many ways, like a private mutual insurance company. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000).

### **Liability.**

While department may sue and be sued in matters relating to state insurance fund, its liability does not extend beyond amount of such fund. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

### **Mutual Insurance Carriers.**

Although there are certain similarities between the state insurance fund and mutual insurance carriers, the differences in the management schemes of the two entities are far more significant. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000).

### **Nature of Fund.**

An injured employee of an uninsured contractor was not entitled to recover compensation from the insured materialman on the ground that the materialman and his surety constituted the "industry," and that the compensation act creates an entity out of the industry and charges thereto all losses sustained by an injured workman, since the act does not contemplate payment to an injured workman by the state insurance fund unless his employer is insured therewith. *Moon v. Ervin*, 64 Idaho 464, 133 P.2d 933 (1943).

The language of this section and § 72-927 is sufficient to constitute a continuing appropriation of money in the fund for the payment of all compensation, expenses or other obligations incurred in carrying out the purpose of the law. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

The money in the state insurance fund does not belong to the state and is not in the state treasury within the meaning of art. 7, § 13 of the Constitution. It is deposited with the state treasurer as custodian and is held by him as such for the contributing employers and the beneficiaries of the compensation law and for the payment of the costs of the operation of the fund. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

The state insurance fund is an agency of the state created for the purpose of carrying on

and effectuating a proprietary function as distinguished from governmental function. It serves a public purpose but not a governmental purpose. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

The state insurance fund is not a corporation within the meaning of art. 3, § 19 of the Constitution forbidding special laws creating any corporation nor within the meaning of art. 11, § 2 against the granting of a charter by special law. Although not a corporation, the fund has some of the characteristics of a private corporation and occupies a similar status. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

The organization of the state insurance fund indicates that it is a state entity, not a private insurance company. *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 996 P.2d 798 (2000).

### **No Judicial Deference to SIF Interpretation.**

Because the State Insurance Fund (SIF) is not authorized to administer statutes governing the enforcement of child support orders or the statutes governing workers' compensation laws, as these responsibilities are respectively held by the Department of Health and Welfare, Bureau of Child Support Enforcement under §§ 7-1202 to 7-1206 and by the Industrial Commission under provisions of Title 72, but has been charged with the responsibility of insuring employers against liability under § 72-901, no judicial deference should be given to the statutory interpretation of SIF to § 11-207. *State Dep't of Health & Welfare ex rel. Lisby v. Lisby*, 126 Idaho 776, 890 P.2d 727 (1995).

### **Powers of Manager.**

Sections 72-901 — 72-904 and 72-907 give the state insurance manager complete power over the fund and settlements thereby; he has power to bind the fund, which has the status of a private insurance company. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

### **Property Rights.**

As a creature of statute, the state insurance fund (SIF) is limited to the power and authority granted to it by the legislature, and any property rights a policyholder might possess must be found either in the insurance contract itself or in the statutory framework of the SIF. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000).

### **Status.**

The state insurance fund is an independent agency and is not an arm of the industrial



accident board and has the status of a private insurance company. Therefore the filing of a claim with the state insurance fund is not the equivalent of and does not meet the require-

ment of the filing of a claim with the industrial accident board. *Atwood v. Department of Agric.*, 80 Idaho 349, 330 P.2d 325 (1958).

### RESEARCH REFERENCES

**Am. Jur.** — 82 Am. Jur. 2d, Workers' Compensation, § 47 et seq.

**C.J.S.** — 100 C.J.S., Workers' Compensation, §§ 640, 641, 646, et seq.

**72-902. State insurance manager — Powers and duties of state insurance manager.** — The board of directors of the state insurance fund shall appoint a manager of the state insurance fund, whose duties, subject to the direction and supervision of the board, shall be to conduct the business of the state insurance fund, and do any and all things which are necessary and convenient in the administration thereof, or in connection with the insurance business to be carried on under the provisions of this chapter. The manager shall have skill and expertise in managing and administering within the insurance industry, shall be of good moral character and shall be bonded in the time, form and manner as prescribed by chapter 8, title 59, Idaho Code. [1917, ch. 81, § 77, p. 252; reen. C. L. 256:77; C. S., § 6289; I. C. A., § 43-1702; am. 1939, ch. 251, § 2, p. 617; am. 1941, ch. 20, § 2, p. 37; am. 1951, ch. 126, § 1, p. 294; am. 1971, ch. 136, § 48, p. 522; am. 1974, ch. 22, § 49, p. 592; am. 1998, ch. 428, § 2, p. 1346.]

### STATUTORY NOTES

**Effective Dates.** — Section 87 of S.L. 1971, ch. 136 declared an emergency. Approved March 18, 1971.

Section 11 of S.L. 1998, ch. 428 declared an emergency. Approved April 3, 1998.

### JUDICIAL DECISIONS

#### ANALYSIS

Liability of department.  
Nature of fund.  
Powers of manager.

#### Liability of Department.

Department is liable for payment to employee, same as any private insurance company. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

#### Nature of Fund.

The language of this section and §§ 72-901 and 72-927 is sufficient to constitute a continuing appropriation of money in the fund for the payment of all compensation, expenses or other obligations incurred in carrying out the

purpose of the law. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

#### Powers of Manager.

Sections 72-901 — 72-904 and 72-907 give the state insurance manager complete power over the fund and settlements thereby; he has power to bind the fund, which has the status of a private insurance company. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

**Cited in:** *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939); *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

**72-903. Further statement of powers.** — a. The manager shall have full power to determine the rates to be charged for insurance in said fund, and to conduct all business in relation thereto, all of which business shall be

conducted in the name of the state insurance manager.

b. Premium payments, voluntary compensation overpayments, and penalties pursuant to the provisions of this act, which remain uncollected four (4) years after they have become due, may be charged off as uncollectible by the manager, if no assets belonging to the liable person and subject to attachment can be found, and in the opinion of the manager there is no likelihood of collection, and the records relating thereto may be destroyed.

c. The manager may cause to be made such summaries, compilations, photographs, duplications, or reproductions of any records or reports of the fund or transcripts thereof, as he may deem advisable for the effective and economical preservation of the information contained therein, and such summaries, compilations, photographs, duplications or reproductions, duly authenticated, shall be admissible in any proceeding under this act if the original record or records would have been admissible therein.

d. The manager may provide by regulation for the destruction or disposition, after reasonable periods, of any records, reports, transcripts or reproductions thereof, or other papers in the custody of the manager, the preservation of which is no longer necessary for the establishment of premium liability or benefit rights or for any purpose necessary to the proper administration of the fund. [1917, ch. 81, § 78, p. 252; reen. C.L. 256:78; C.S., § 6290; I.C.A., § 43-1703; am. 1939, ch. 251, § 3, p. 617; am. 1941, ch. 20, § 3, p. 37; am. 1951, ch. 270, § 1, p. 571.]

### STATUTORY NOTES

**Cross References.** — Detailed directions as to rates, § 72-913. ch. 270 declared an emergency. Approved March 20, 1951.

**Effective Dates.** — Section 2 of S.L. 1951,

### JUDICIAL DECISIONS

#### ANALYSIS

Liability.

Powers of manager.

#### Liability.

Department is liable for payment to employee, same as any private insurance company. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

over the fund and settlements thereby; he has power to bind the fund, which has the status of a private insurance company. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

**Cited in:** *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

#### Powers of Manager.

Sections 72-901 — 72-904 and 72-907 give the state insurance manager complete power

**72-904. Power to sue and be sued.** — The manager may, in his official name, sue and be sued in all the courts of the state, and before the industrial commission in all actions or proceedings arising out of anything done or offered in connection with the state insurance fund or business relating thereto. [1917, ch. 81, § 79, p. 252; reen. C.L. 256:79; C.S., § 6291; I.C.A., § 43-1704; am. 1939, ch. 251, § 4, p. 617; am. 1941, ch. 20, § 4, p. 37.]



### STATUTORY NOTES

**Compiler's Notes.** — The words "industrial commission" were substituted for "industrial accident board" on the authority of S.L. 1971, ch. 124, § 3, p. 422, compiled herein as

§ 72-502, which provided that the references to the "industrial accident board" and "board" were deemed to be references to the "industrial commission."

### JUDICIAL DECISIONS

#### ANALYSIS

Liability.  
Powers of manager.

#### Liability.

The department is liable for payment to employee, same as any private insurance company. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

over the fund and settlements thereby; he has power to bind the fund, which has the status of a private insurance company. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

**Cited in:** *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

#### Powers of Manager.

Sections 72-901 — 72-904 and 72-907 give the state insurance manager complete power

**72-905. Contracts.** — The manager may make contracts of insurance as herein provided and such other contracts relating to the state insurance fund as are authorized or permitted under the provisions of this chapter. [1917, ch. 81, § 80, p. 252; reen. C.L. 256:80; C.S., § 6292; I.C.A., § 43-1705; am. 1939, ch. 251, § 5, p. 617; am. 1941, ch. 20, § 5, p. 37.]

### STATUTORY NOTES

**Cross References.** — Policies, § 72-918.  
Reinsurance, § 72-921.

### JUDICIAL DECISIONS

**Cited in:** *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926); *State ex rel. Wright v.*

*Smith*, 60 Idaho 316, 91 P.2d 389 (1939); *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

**72-906. Employment of assistants.** — The manager may employ such assistants, experts, statisticians, actuaries, accountants, inspectors, clerks, and other employees as necessary to carry out the provisions of this chapter and to perform the duties imposed upon him by this chapter. The personnel policies and compensation schedules for employees shall be adopted by the board of directors and shall be comparable in scope to other insurance companies doing business in the state and the region. Employees shall be members of the public employee retirement system. [1917, ch. 81, § 81, p. 252; reen. C. L. 256:81; C. S., § 6293; I. C. A., § 43-1706; am. 1941, ch. 20, § 6, p. 37; am. 1974, ch. 22, § 50, p. 592; am. 1998, ch. 428, § 3, p. 1346.]

### STATUTORY NOTES

**Effective Dates.** — Section 61 of S. L. 1974, ch. 22 provided that the act should take effect on and after July 1, 1974.

Section 11 of S.L. 1998, ch. 428 declared an emergency. Approved April 3, 1998.

### JUDICIAL DECISIONS

#### ANALYSIS

Construction of section.

Representation by attorney general.

#### Construction of Section.

This statute as it was worded prior to 1939 and as it is now worded in this section, was and is sufficiently broad and explicit to encompass the employment of a legal assistant as was done in this case. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

§ 67-1401 and the extent to which the state government is involved with the state insurance fund (SIF), the attorney general acted within the bounds of statutory authority in contracting to represent SIF and its non-governmental insureds. *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 996 P.2d 798 (2000).

#### Representation by Attorney General.

Given the broad language employed in

**72-907. Personal liability.** — The manager shall not, nor shall any person employed by him, be personally liable in his private capacity for or on account of any act performed or contract entered into in an official capacity in good faith and without intent to defraud, in connection with the administration of the state insurance fund or affairs relating thereto. [1917, ch. 81, § 82, p. 252; reen. C.L. 256:82; am. 1919, ch. 8, § 47, p. 43; C.S., § 6294; am. 1921, ch. 104, § 8, p. 233; I.C.A., § 43-1017; am. 1939, ch. 251, § 7, p. 617; am. 1941, ch. 20, § 7, p. 37.]

### JUDICIAL DECISIONS

#### ANALYSIS

Contracts.

Powers of manager.

Subrogation claims.

#### Contracts.

This section, which is constitutional, granting immunity to the manager and the person employed by him is applicable to a contract entered into between the manager and an attorney, such contract being entered into in good faith and without intent to defraud, upon suit being brought by the state auditor, to recover moneys paid out of the state insurance fund by such manager to the attorney for his services rendered to the fund. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

the state insurance manager complete power over the fund and settlements thereby; he has power to bind the fund, which has the status of a private insurance company. *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

#### Subrogation Claims.

There was nothing illegal or improper in the agreement between the manager and the legal assistant for the prosecution of subrogation claims on a contingent fee basis. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

#### Powers of Manager.

Sections 72-901 — 72-904 and 72-907 give



**72-908. Salaries, expenses and payment of same.** — The salary of the manager of the state insurance fund, and the salary or compensation of employees in said fund, and all expenses incurred by said fund shall be audited and paid out of the moneys belonging to said fund. [1917, ch. 81, § 83, p. 252; reen. C.L. 256:83; am. 1919, ch. 8, § 48, p. 43; C.S., § 6295; I.C.A., § 43-1708; am. 1939, ch. 251, § 8, p. 617.]

**72-909. Delegation of powers.** — The manager, as successor of the compensation insurance commission may act through proper deputies and may delegate to such deputies such power as he deems necessary or convenient.

Among the powers which may be so delegated shall be the power to enter into contracts of insurance, insuring employers against liability for compensation under Workmen's Compensation Law and Occupational Disease Compensation Law, and insuring to employees the compensation fixed by said laws; also the power to make agreements, subject to the approval of the industrial commission having jurisdiction, for the settlement of claims against said fund for compensation for injuries in accordance with the provisions of said laws; also the power to determine to whom and through whom payments of such compensation shall be made; and also the power to contract with physicians, surgeons and hospitals for medical and surgical treatment and care and nursing of injured persons entitled to compensation from said fund. [1917, ch. 81, § 84, p. 252; reen. C.L. 256:84; C.S., § 6296; I.C.A., § 43-1709; am. 1939, ch. 251, § 9, p. 617; am. 1941, ch. 20, § 8, p. 37.]

#### STATUTORY NOTES

**Compiler's Notes.** — Present Worker's Compensation Law, compiled herein as §§ 72-101 — 72-804, includes former Occupational Disease Compensation Law.

The words "industrial commission" were substituted for "industrial accident board" on

the authority of S.L. 1971, ch. 124, § 3, p. 422, compiled herein as § 72-502, which provided that the references to the "industrial accident board" and "board" were deemed to be references to the "industrial commission."

#### JUDICIAL DECISIONS

**Cited in:** *Rivera v. Johnston*, 71 Idaho 70, 225 P.2d 858 (1950).

**72-910. State treasurer custodian of fund.** — The state treasurer shall be the custodian of the state insurance fund, and all disbursements therefrom shall be paid by him upon warrants signed by the state controller, or upon sight drafts signed by the state insurance manager as provided by section 72-927, Idaho Code. The state treasurer shall give a separate and additional bond in an amount to be fixed by the governor, and with sureties approved by him, conditioned for the faithful performance of his duty as custodian of the state insurance fund. The state treasurer may deposit any portion of the said fund not needed for immediate use, in the manner and subject to all the provisions of law respecting the deposit of other state funds by him. Interest earned by such portion of the state insurance fund

deposited by the state treasurer shall be collected by him and placed to the credit of the fund. [1917, ch. 81, § 86, p. 252; reen. C.L. 256:86; C.S., § 6297; I.C.A., § 43-1710; am. 1939, ch. 251, § 10, p. 617; am. 1994, ch. 180, § 236, p. 420.]

### STATUTORY NOTES

**Cross References.** — Deposit of state funds by treasurer, § 67-2737.

**Effective Dates.** — Section 241 of S.L. 1994, ch. 180 provided that such act should become effective on and after the first Monday in January, 1995 [January 2, 1995] if the amendment to the Constitution of Idaho

changing the name of the state auditor to state controller [1994 S.J.R. No. 109, p. 1493] was adopted at the general election held on November 8, 1994. Since such amendment was adopted, the amendment to this section by § 236 of S.L. 1994, ch 180 became effective January 2, 1995.

### JUDICIAL DECISIONS

#### ANALYSIS

Application of section.  
Nature of fund.

#### Application of Section.

The money in the state insurance fund does not belong to the state and is not in the state treasury within the meaning of article 7, § 13 of the Constitution. It is deposited with the state treasurer as custodian and is held by him as such for the contributing employers and the beneficiaries of the compensation law and for the payment of the costs of the operation of the fund. State ex rel. Williams v. Musgrave, 84 Idaho 77, 370 P.2d 778 (1962).

#### Nature of Fund.

The state insurance fund is an agency of the state created for the purpose of carrying on and effectuating a proprietary function as distinguished from governmental function. It serves a public purpose but not a governmental purpose. State ex rel. Williams v. Musgrave, 84 Idaho 77, 370 P.2d 778 (1962).

**Cited in:** Selkirk Seed Co. v. Forney, 134 Idaho 98, 996 P.2d 798 (2000).

## 72-911. Surplus and reserve. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised 1917, ch. 81, § 87, p. 252; reen. C.L. 256:87; C.S., § 6298; I.C.A., § 43-1711;

am. 1939, ch. 251, § 11, p. 617; am. 1941, ch. 20, § 9, p. 37, was repealed by S.L. 1998, ch. 428, § 4, effective April 3, 1998.

**72-912. Investment of surplus or reserve.** — The endowment fund investment board shall at the direction of the manager invest any of the surplus or reserve funds belonging to the state insurance fund in real estate and the same securities and investments authorized for investments by insurance companies in Idaho as shall be approved by the manager. The endowment fund investment board shall be the custodian of all such securities or evidences of indebtedness, provided that the endowment fund investment board may employ a custodial bank to hold such securities. The state insurance fund is authorized to pay the actual expenses of the endowment fund investment board which the board incurs in investing surplus or reserve funds and which are approved by the manager of the state insurance fund. It shall collect the principal and interest thereof, when due, and pay the same into the state insurance fund. The state treasurer shall pay all warrants or vouchers drawn on the state insurance manager



and by the state controller. The endowment fund investment board at the request of the manager may sell any of such securities, the proceeds thereof to be paid over to the state treasurer for said insurance fund. Where such funds of the state insurance fund have been or are hereafter invested, with real property as security, and the said real property has been or is hereafter acquired by the state of Idaho by reason of foreclosure proceedings, voluntary deed, or otherwise, such property shall be held in trust by the state of Idaho for the benefit of the state insurance fund and may be sold by the endowment fund investment board at the request of the manager of said fund, and said sale may be had at private sale or public auction, upon such terms and under such conditions as the endowment fund investment board deems for the best interest of the state, but no sale of real estate at private sale may be had for a less price than the amount, with accrued interest, costs and expenses, which has been invested by the state insurance fund in said real estate. Where such sale is to be made at public auction, it must take place in the county where the real estate is situated, and notice of time and place of sale must be posted in three (3) of the most public places in such county, and published in a newspaper, if there be one (1) printed in the said county, for at least once a week for not less than two (2) consecutive weeks, within thirty (30) days prior to the sale. Where such sale is to be made at private sale, it must take place in the county where the real estate is situated, and notice of time and place of sale must be posted in three (3) of the most public places in such county, and published in a newspaper, if there be one (1) printed in said county, for at least once a week for not less than two (2) consecutive weeks, within thirty (30) days prior to the sale. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen (15) days from the first publication of notice, and the sale must not be made before that day, but must be made within six (6) months thereafter. The bids or offers must be in writing, sealed, and delivered to the investment manager of the endowment fund investment board. The real estate and tenements, or the part thereof or interest therein to be sold, must be described with common certainty in the notice. The deed or deeds to such real estate shall be executed in the name of the state of Idaho as required by section 16, chapter 4 of the constitution of the state of Idaho, and the proceeds from any such sale be paid over to the state treasurer for said insurance funds. [C.S., § 6299, as enacted by 1925, ch. 129, § 2, p. 183; I.C.A., § 43-1712; am. 1939, ch. 251, § 12, p. 617; am. 1941, ch. 20, § 10, p. 37; am. 1943, ch. 168, § 1, p. 355; am. 1969, ch. 466, § 13, p. 1326; am. 1970, ch. 170, § 1, p. 498; am. 1978, ch. 18, § 1, p. 36; am. 1994, ch. 180, § 237, p. 420.]

#### STATUTORY NOTES

**Cross References.** — Notice by mail, § 60-109A.

**Prior Laws.** — Former C.S., § 6299 (S.L. 1917, ch. 81, § 88; reen. C.L. 256:88) as amended by S.L. 1921, ch. 244 was repealed by S.L. 1925, ch. 129, § 1, and the above

section enacted as a new section to be known as C.S., § 6299.

**Effective Dates.** — Section 3 of S.L. 1925, ch. 129 declared an emergency.

Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on

and after the first Monday of January, 1995, if the state board of canvassers has certified that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the

state auditor to state controller." Since such amendment was adopted, the amendment to this section by S.L. 1994, ch. 180 became effective January 2, 1995.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.  
Interpretation.

#### **Construction.**

Section 72-302 can be complied with without violating the provisions of this section, and these two sections can be construed in harmony. *Edwards v. Industrial Comm'n*, 130 Idaho 457, 943 P.2d 47 (1997).

#### **Interpretation.**

The plaintiff's request that the commission issue a declaratory ruling interpreting this

section and § 72-301 which would have required the commission itself to take certain action raised serious due process questions, and a petition for writ of mandamus was the proper course of action for the plaintiff to take under the circumstances in this case. *Edwards v. Industrial Comm'n*, 130 Idaho 457, 943 P.2d 47 (1997).

**72-912A. Appointment of investment managers.** — The manager of the state insurance fund may direct the endowment fund investment board to select and contract with a minimum of one (1) investment manager to manage the investment of the state insurance funds. The designated investment manager or managers, shall, subject to the direction of the endowment fund investment board, exert control over the funds as though the investment manager were the owner thereof. The endowment fund investment board shall be responsible for assuring that the investment manager complies with this act. [I.C., § 72-912A, as added by 1970, ch. 170, § 2, p. 498; am. 1978, ch. 18, § 2, p. 36.]

## STATUTORY NOTES

**Effective Dates.** — Section 3 of S.L. 1970, ch. 170 declared an emergency. Approved March 13, 1970.

**72-913. Classification of risks and adjustment of premiums.** — Employments insured in the state insurance fund shall be divided by the manager, for the purposes of the said fund, into classes. Separate accounts shall be kept of the amounts collected and expended in respect to each such class for convenience in determining equitable rates; but for the purpose of paying compensation, the state insurance fund shall be deemed one (1) and indivisible. The manager shall have power to rearrange any of the classes by withdrawing any employment embraced in it and transferring it wholly or in part to any other class, and from such employments to set up new classes in his discretion. The manager shall determine the hazards of the different classes and fix the rates of premiums therefor based upon the total payroll and number of employees in each of such classes of employment at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve; but for



such purpose and in so fixing such rates of premium, such rates shall be fixed with due regard to the physical hazards of each industry, occupation, or employment, and, within each class, so far as practicable, in accordance with the elements of bodily risk or safety or other hazard of the plant or premises or work of each insured and the manner in which the same is conducted, together with a reasonable regard for the accident experience and history of each such insured, and with due regard to the accessibility of medical and hospital facilities. [1917, ch. 81, § 90, p. 252; compiled and reen. C.L. 256:90; C.S., § 6301; 1927, ch. 106, § 18, p. 136; am. 1929, ch. 164, § 3, p. 295; I.C.A., § 43-1713; am. 1939, ch. 251, § 13, p. 617; am. 1941, ch. 20, § 11, p. 37; am. 1945, ch. 95, § 1, p. 145.]

### JUDICIAL DECISIONS

**Cited in:** Flynn v. Carson, 42 Idaho 141, 243 P. 818 (1926).

**72-914. Accounts.** — The manager shall keep an account of the money paid in premiums by each of the several classes of employments, and the expense of administering the state insurance fund, and the disbursements on account of injuries and deaths of employees in each of said classes, including the setting up of reserves adequate to meet anticipated and unexpected losses and to carry the claims to maturity; and also an account of the money received from each individual employer; and of the amount disbursed from the state insurance fund for expenses, and on account of injuries and disablement and death of the employees of such employer, including the reserves so set up.

**Examination of Fund:** The state insurance fund shall be examined by the department of insurance at least once in five (5) years. For such purpose the director of the department of insurance shall appoint as examiner one (1) or more competent persons not officers of or connected with any insurance corporation other than as policyholders. The examiner or examiners so appointed shall make a full and true report of such examination, verified under oath, and such report when completed shall be included in and made a part of any report required by law to be made by the fund to the governor of this state. At the direction of the director of the department of insurance, the costs of such examination shall be paid by the fund in accordance with section 41-228, Idaho Code.

The director of the department of insurance shall transmit to the governor a copy of the official examination of the state insurance fund immediately upon its completion by the examiner or examiners, and a copy of such examination report shall be filed in the department of insurance and be open to public inspection. [1917, ch. 81, § 91, p. 252; reen. C.L. 256:91; C.S., § 6302; I.C.A., § 43-1714; am. 1939, ch. 251, § 14, p. 617; am. 1941, ch. 20, § 12, p. 37; am. 1947, ch. 211, § 1, p. 495; am. 2001, ch. 85, § 14, p. 211; am. 2004, ch. 237, § 1, p. 700.]

## JUDICIAL DECISIONS

**Cited in:** *Brady v. Place*, 41 Idaho 747, 242 243 P. 654 (1926); *Flynn v. Carson*, 42 Idaho P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 141, 243 P. 818 (1926).

**72-915. Dividends.** — At the end of every year, and at such other times as the manager in his discretion may determine, a readjustment of the rate shall be made for each of the several classes of employments or industries. If at any time there is an aggregate balance remaining to the credit of any class of employment or industry which the manager deems may be safely and properly divided, he may in his discretion, credit to each individual member of such class who shall have been a subscriber to the state insurance fund for a period of six (6) months or more, prior to the time of such readjustment, such proportion of such balance as he is properly entitled to, having regard to his prior paid premiums since the last readjustment of rates. [1917, ch. 81, § 92, p. 252; reen. C.L. 256:92; C.S., § 6303; I.C.A., § 43-1715; am. 1939, ch. 251, § 15, p. 617; am. 1941, ch. 20, § 13, p. 37.]

## JUDICIAL DECISIONS

**Cited in:** *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000).

**72-916. Assessments. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised S.L. 1917, ch. 81, § 93, p. 252; C.L. 256:93; C.S., § 6304; I.C.A., § 43-1716; 1939, ch. 251, § 16, p. 617; 1941, ch. 20, § 14, p. 37, was repealed by S.L. 1951, ch. 269, § 1, p. 570.

**72-917. Readjustment of payrolls.** — If the amount of premium collected from any employer at the beginning of any period is ascertained by using the estimated expenditure of wages for the period of time covered by such premium payment as a basis, and adjustment of the amount of such premium shall be made at the end of such period and the actual amount of such premium shall be determined in accordance with the amount of the actual expenditure of wages for such period; and if such wage expenditure for such period is less than the amount of which such estimated premium was collected, such employer shall be entitled to receive a refund from the state insurance fund of the difference between the amount so paid by him and the amount so found to be actually due, or to have the amount of such difference credited on succeeding premium payments at his option; and if such actual premium, when so ascertained, exceeds in amount a premium so paid by such employer at the beginning of such period, such employer shall immediately upon being advised of the true amount of such premium due forthwith pay to the manager an amount equal to the difference between the amount actually found to be due and the amount paid by him at the beginning of such period, for deposit in the state insurance fund. [1917, ch. 81, § 94, p. 252; reen. C.L. 256:94; C.S., § 6305; I.C.A., § 43-1717; am. 1939, ch. 251, § 17, p. 617; am. 1941, ch. 20, § 15, p. 37.]



**JUDICIAL DECISIONS**

**Cited in:** *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

**72-918. Policies and payment of premiums.** — 1. Every employer insuring in the state insurance fund shall receive from the manager a contract or policy of insurance.

2. Except as otherwise provided in this chapter, all premiums shall be paid by every employer who elects to insure with the state insurance fund to the manager semi-annually, or at such times as may be prescribed by the manager. Receipts shall be given for such payments and the money shall be paid over to the state treasurer to the credit of the state insurance fund.

3. Premiums may be paid quarterly by public employers and deposits from public employers shall not be required in an amount in excess of the previous quarter's earned payment. [1917, ch. 81, § 95, p. 252; reen. C.L. 256:95; C.S., § 6306; I.C.A., § 43-1718; am. 1939, ch. 251, § 18, p. 617; am. 1941, ch. 20, § 16, p. 37; am. 1977, ch. 215, § 1, p. 631.]

**STATUTORY NOTES**

**Cross References.** — Premium tax, § 72-523.

**72-919. Actions for collection in case of default — Penalty — Cancellation of policy.** — If an employer shall default in any payment required to be made by him to the state insurance fund, the amount due from him shall be collected by civil action against him in the name of the manager, and it shall be the duty of the manager forthwith to bring or cause to be brought against each such employer a civil action in the proper court for the collection of such amount so due; and the same, when collected by the manager shall be paid into the state insurance fund, and such employer's compliance with the provisions of this chapter requiring payment to be made to the state insurance fund shall date from the time of the payment of said money so collected to the manager.

The policy of insurance held by an employer who fails to comply with reasonable requirements established by the manager, or who is in default in his premium payments for more than thirty (30) days may be canceled at the discretion of the manager.

An employer who is in default for 10 days in payment of any premium shall also be liable to a penalty for every day during which such failure continues of \$1.00 for every employee, to be recovered in an action brought by the manager and the amounts so collected shall be paid into the state insurance fund.

The manager may, however, in his discretion, for good cause shown, remit any such penalty in whole or in part, provided the employer in default subsequently pays the premium. [1917, ch. 81, § 96, p. 252; reen. C.L. 256:96; C.S., § 6307; I.C.A., § 43-1719; am. 1939, ch. 251, § 19, p. 617; am. 1941, ch. 20, § 17, p. 37; am. 1941, ch. 112, § 1, p. 199.]

### STATUTORY NOTES

**Cross References.** — Manager's general power to sue, § 72-904.

### JUDICIAL DECISIONS

**Set Off.**

State has power to sue for and collect moneys due fund, and, in suit brought against state, to set off moneys admittedly due it. *Ada*

*Inv. Co. v. State*, 40 Idaho 409, 234 P. 304 (1925).

**Cited in:** *State ex rel. Wright v. Smith*, 60 Idaho 316, 91 P.2d 389 (1939).

**72-920. Withdrawal from fund.** — Any employer may upon complying with subdivision 2 of section 72-801, withdraw from the fund by turning in his insurance contract or policy for cancelation, provided he is not in arrears for premiums due to the fund and has given to the manager 30 days' written notice of his intention to withdraw; and also provided that in case any employer so withdraws, his liability to assessments shall continue after the date of such withdrawal as against all liabilities for such compensation accruing prior to such withdrawal.

Any employer so withdrawing may, however, terminate his entire liability by paying to the manager such sum as said manager may deem sufficient to cover such liabilities. [1917, ch. 81, § 97, p. 252; reen. C.L. 256:97; C.S., § 6308; am. 1921, ch. 217, § 23, p. 474; I.C.A., § 43-1720; am. 1939, ch. 251, § 20, p. 617; am. 1941, ch. 20, § 18, p. 37.]

### STATUTORY NOTES

**Compiler's Notes.** — Section 72-801 referred to in the first paragraph of this section does not contain a subdivision (2).

### JUDICIAL DECISIONS

#### ANALYSIS

Cancelation of policy.

Liability of fund.

Property rights.

**Cancelation of Policy.**

Policy of compensation insurance cannot be canceled except by strict compliance with terms of policy and statute. *Passmore v. Austin*, 73 Idaho 484, 253 P.2d 800 (1953).

**Liability of Fund.**

Where the employer notified the fund of his taking out an insurance policy and the fund failed to cancel his insurance with it, the fund was liable for a compensable death, and this did not relieve the insurance company. *Cowles v. State Ins. Fund*, 67 Idaho 165, 173 P.2d 722 (1946).

**Property Rights.**

There was no inequity in a finding that no property interest in the assets of the state insurance fund (SIF) were granted to policyholders, since those policyholders were free to withdraw from SIF and purchase insurance from a private company if they believed the fund to be potentially insecure. *Kelso & Irwin, P.A. v. State Ins. Fund*, 134 Idaho 130, 997 P.2d 591 (2000).

**72-921. Reinsurance.** — The manager may reinsure any risk, or any part thereof, and may enter into agreements of reinsurance in the same way



and to the same extent as other insurance carriers, the cost of which shall be paid out of current premium income. [1917, ch. 81, § 98, p. 252; reen. C.L. 256:98; C.S., § 6309; I.C.A., § 43-1721; am. 1939, ch. 251, § 21, p. 617; am. 1941, ch. 20, § 19, p. 37; am. 1945, ch. 147, § 1, p. 225; am. 1986, ch. 112, § 1, p. 305.]

**72-922. Audit of payrolls.** — Every employer who is insured in the state insurance fund shall keep a true and accurate record of the number of his employees and the wages paid by him to each employee, and shall furnish to the manager, upon demand, a sworn statement of the same. Such record shall be open to inspection at any time and as often as the manager shall require to verify the number of employees and the amount of payroll. [1917, ch. 81, § 99, p. 252; reen. C.L. 256:99; C.S., § 6310; I.C.A., § 43-1722; am. 1939, ch. 251, § 22, p. 617; am. 1941, ch. 20, § 20, p. 37.]

## JUDICIAL DECISIONS

### ANALYSIS

Issuance of policy.  
Purpose.

#### Issuance of Policy.

The authority to issue a compensation policy by the state insurance fund and containing provisions for its cancellation may be inferred from this section. State ex rel. Wright v. Smith, 60 Idaho 316, 91 P.2d 389 (1939).

#### Purpose.

The purpose of this section and of the provision of the contract requiring the in-

sured to make payroll reports, is to enable the state insurance fund to ascertain the amount to be collected as premium for carrying the risks. State ex rel. Wright v. Smith, 60 Idaho 316, 91 P.2d 389 (1939).

**Cited in:** Flynn v. Carson, 42 Idaho 141, 243 P. 818 (1926).

**72-923. Falsification of payroll.** — An employer who shall misrepresent the amount of the payroll upon which the premiums chargeable by the state insurance fund are to be based shall be liable to the manager 10 times the amount of the difference between the premiums paid and the amount the employer should have paid had his payroll been correctly computed; and the liability to the manager under this section shall be enforced in a civil action by the manager, and any amount so collected shall become a part of the state insurance fund. [1917, ch. 81, § 100, p. 252; reen. C.L. 256:100; C.S., § 6311; I.C.A., § 43-1723; am. 1939, ch. 251, § 23, p. 617; am. 1941, ch. 20, § 21, p. 37.]

## STATUTORY NOTES

**Cross References.** — False representation also a misdemeanor under § 72-801.  
Manager's general power to sue, § 72-904.

**Compiler's Notes.** — The bracketed word "premiums" was inserted by the compiler.

## JUDICIAL DECISIONS

**Cited in:** Flynn v. Carson, 42 Idaho 141, 243 P. 818 (1926).

**72-924. Wilful misrepresentation.** — Any person who wilfully misrepresents any fact in order to obtain insurance in the state insurance fund at less than the proper rate for such insurance, or in order to obtain payment out of such fund, shall be guilty of a misdemeanor. [1917, ch. 81, § 101, p. 252; reen. C.L. 256:101; C.S., § 6312; I.C.A., § 43-1724.]

#### JUDICIAL DECISIONS

**Cited in:** *Flynn v. Carson*, 42 Idaho 141, 243 P. 818 (1926).

**72-925. Inspections.** — The manager shall have the right to inspect the plants and establishments of employers insured in the state insurance fund; and the inspectors designated by the manager shall have free access to such premises during regular working hours, and at other reasonable times. [1917, ch. 81, § 102, p. 252; reen. C.L. 256:102; C.S., § 6313; I.C.A., § 43-1725; am. 1939, ch. 251, § 24, p. 617; am. 1941, ch. 20, § 22, p. 37.]

**72-926. Disclosures prohibited.** — Information acquired by the manager from employers or employees pursuant to this chapter shall be subject to disclosure according to chapter 3, title 9, Idaho Code, and any officer or employee of the manager or of the state insurance fund who, without authority of the manager or pursuant to his rules, or as otherwise required by law, shall disclose the same, shall be guilty of a misdemeanor. [1917, ch. 81, § 103, p. 252; reen. C.L. 256:103; C.S., § 6314; I.C.A., § 43-1726; am. 1939, ch. 251, § 25, p. 617; am. 1941, ch. 20, § 23, p. 37; am. 1990, ch. 213, § 107, p. 480.]

#### STATUTORY NOTES

**Cross References.** — Penalty for misdemeanor when not otherwise provided, § 18-113.

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L.

1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

#### JUDICIAL DECISIONS

##### **Evidence.**

An employer's statement of employee's earnings submitted to the state insurance fund for basis of figuring premiums is admissible in evidence, notwithstanding the statutory provision prohibiting disclosure of information acquired from employer under the

Workmen's Compensation Law, and such statements are admissible without making explanatory offer, and proper when the competency and relevancy appeared on the face of the statements. *Joslin v. Idaho Times Publishing Co.*, 60 Idaho 235, 91 P.2d 386 (1939).

**72-927. Payment of compensation and refunds.** — The state insurance manager shall submit each month to the state board of examiners an estimate of the amount necessary to meet the current disbursements for workmen's compensation insurance losses and premium refunds to policyholders from the state insurance fund, during each succeeding calendar month, and when such estimate shall be approved by the state board of



examiners, the state treasurer is authorized to pay the same out of the state insurance fund upon sight drafts drawn by the state insurance manager. At the end of each calendar month the state insurance manager shall account to the state board of examiners for all money so received, furnishing proper vouchers therefor. [1917, ch. 81, § 105, p. 252; reen. C.L. 256:105; C.S., § 6315; I.C.A., § 43-1727; am. 1939, ch. 251, § 26, p. 37.]

## JUDICIAL DECISIONS

### ANALYSIS

Attorney's fees.  
Insurance fund not subject to claims.  
Nature of fund.

#### Attorney's Fees.

Attorney performing legal services for the fund was not an employee of the state within the meaning of the standard appropriations act. His relationship to the fund was that of attorney and client, on a fee basis which made him an independent contractor. Such fees were not a part of the overhead administrative expenses of the fund and hence were not payable out of the appropriation made for the payment of such expenses. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

#### Insurance Fund Not Subject to Claims.

The state insurance fund, not being state money, and claims against it not being claims against the state, the state board of examiners has no power or jurisdiction over the expenditure or disbursements thereof, except such as is given to it by the legislature. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

#### Nature of Fund.

The language of §§ 72-901 and 72-902 and this section is sufficient to constitute a con-

tinuing appropriation of money in the fund for the payment of all compensation, expenses or other obligations incurred in carrying out the purpose of the law. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

The money in the state insurance fund does not belong to the state and is not in the state treasury within the meaning of article 7, § 13 of the Constitution. It is deposited with the state treasurer as custodian and is held by him as such for the contributing employers and the beneficiaries of the compensation law and for the payment of the costs of the operation of the fund. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

The state insurance fund is an agency of the state created for the purpose of carrying on and effectuating a proprietary function as distinguished from governmental function. It serves a public purpose but not a governmental purpose. *State ex rel. Williams v. Musgrave*, 84 Idaho 77, 370 P.2d 778 (1962).

**Cited in:** *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

**72-928. Insurance by public corporations — Provision for Idaho national guard.** — (a) A public corporation may insure against its liability for compensation with the state insurance fund and not with any other insurance carrier, unless such fund shall refuse to accept the risk when the application for insurance is made: Provided however that the benefits secured by section 72-103, Idaho Code, to members of the Idaho national guard while on duty shall be secured in the manner prescribed in subsections (b) and (c) of this section; and provided further that the restrictions of this section shall not apply to any governmental hospital whose operation is financed primarily by patient care revenue.

(b) All claims for compensation against the Idaho national guard accruing on or after March 5, 1949, under the provisions of title 72, Idaho Code, on account of members of the Idaho national guard while on duty shall be deemed secured by the state insurance fund, and payment thereof shall be made to claimants entitled thereto in accordance with the provisions of title

72, Idaho Code, in the same manner and amount as any other employment insured by the state insurance fund. The manager of the state insurance fund shall service all claims as though they were insured claims and not require payment of any premium as a condition of securing the liability of the Idaho national guard, but the state insurance fund, shall in lieu of any premium, be reimbursed, as provided in subsection (c) of this section, for moneys paid out on account of the liability of the Idaho national guard. Nothing in this subsection shall be construed to amend or modify any substantive provision of this title. No charge shall be made by the fund for administration of the guard's liability hereunder.

(c) Commencing on July 1, 1950, and quarterly thereafter, the manager of the state insurance fund shall prepare in the form of a claim an itemized statement of all moneys paid out by the fund pursuant to subsection (b) of this section during the quarter concerned on account of the liability as an employer of Idaho national guard. Such statement shall list the amount of payments made and to whom and on whose account such payments are made, and shall be forwarded to the adjutant general of the state, who shall indorse thereon his approval of the statement and forward the same to the board of examiners. The board of examiners shall examine such claim and if the board finds the claim in accordance with law the board shall order the state treasurer to pay to the state insurance fund an amount equal to the total sum of moneys paid out as set forth in such statement. There is hereby appropriated out of any moneys in the treasury, not otherwise appropriated, a sum of money sufficient to meet these quarterly claims as they are from time to time presented. The claim statement filed by the manager as of July 1, 1950 shall cover all claims pursuant to this section between March 5, 1949 and July 1, 1950. [1917, ch. 81, § 107, p. 252; reen. C.L. 256:107; C.S., § 6316; I.C.A., § 43-1728; am. 1950 (E.S.), ch. 79, § 2, p. 106; am. 1977, ch. 118, § 1, p. 253.]

#### STATUTORY NOTES

**Cross References.** — Payment of liability of public employer, § 72-314.

Rate making and rating organizations, exemption from application of, § 41-1618.

**Compiler's Notes.** — Section 72-103 referred to in subsection (a) of this section was repealed by S.L. 1971, ch. 124, § 2. For present law see § 72-205.

Section 1 of S.L. 1950 (E.S.), ch. 79 read: "Recognizing that the Idaho National Guard is an important element in maintenance of the defenses of this nation, and that fulfill-

ment by the Guard of its mission and duty is in part dependent on the existence of adequate provision for the payment of compensation to members of the Idaho National Guard for injury, disability or death incurred while on duty in the Guard, it is hereby declared and recognized that provision for the payment of such compensation is an obligation of the government of the state of Idaho."

**Effective Dates.** — Section 3 of S.L. 1950 (E.S.), ch. 79 declared an emergency. Approved March 8, 1950.

**72-929. Maritime risk coverage.** — Notwithstanding any Idaho Code provision to the contrary, the state insurance fund may participate in any pooling arrangement that is under the direction and control of the national council on compensation insurance that will provide insurance for risks located in the state of Idaho which are subject to the United States longshoremen's and harbor workers' compensation act. The state insurance



fund is hereby authorized to pay any reasonable assessments that arise out of participation in such a pooling arrangement. [I.C., § 72-929, as added by 1977, ch. 301, § 1, p. 845.]

### STATUTORY NOTES

**Federal References.** — The United States longshoremen's and harbor workers' compensation act referred to in this section is compiled as 33 U.S.C. §§ 901-950.

## CHAPTER 10

### CRIME VICTIMS COMPENSATION

#### SECTION.

- 72-1001. Short title.
- 72-1002. Legislative purpose and intent.
- 72-1003. Definitions.
- 72-1004. Powers and duties of commission.
- 72-1005. Rehabilitation of victims.
- 72-1006. Attorneys' fees.
- 72-1007. Public inspection and disclosure of commission's records.
- 72-1008. Limitation of benefit entitlements to proportionate share of available funds.
- 72-1009. Crime victims compensation account.
- 72-1010. Receipt of funds.
- 72-1011. Penalty for fraudulently obtaining benefits.
- 72-1012. Application for compensation.
- 72-1013. Informal hearings.
- 72-1014. Evidence of condition.

#### SECTION.

- 72-1015. Enforcement of commission's orders — Improper assertion of privilege.
- 72-1016. Limitations on awards.
- 72-1017. Tentative award of compensation.
- 72-1018. Award of compensation.
- 72-1019. Compensation benefits.
- 72-1020. Award not subject to execution, attachment, garnishment, or assignment — Exception.
- 72-1021. Reconsideration and review of commission's decisions.
- 72-1022. No appeal.
- 72-1023. Subrogation.
- 72-1024. Effect of award on probation and parole of offender.
- 72-1025. Fines — Reimbursements — Priority — Disposition.
- 72-1026. [Repealed.]

**72-1001. Short title.** — This chapter may be cited as "The Crime Victims Compensation Act." [I.C., § 72-1001, as added by 1986, ch. 337, § 1, p. 824.]

### STATUTORY NOTES

**Compiler's Notes.** — Section 72-1026 which provided that the provisions of Chapter 72-10 would be repealed effective June 30, 1991, was repealed by § 1 of S.L. 1991, ch. 4, effective July 1, 1991. Therefore, this chapter will not be repealed effective June 30, 1991.

### JUDICIAL DECISIONS

**Cited in:** State v. Paz, 112 Idaho 407, 732 P.2d 376 (Ct. App. 1987).

### RESEARCH REFERENCES

**Am. Jur.** — 21A Am. Jur. 2d, Criminal Law, § 1321 et seq.

**C.J.S.** — 24 C.J.S., Criminal Law, § 1760 et seq.

**72-1002. Legislative purpose and intent.** — The legislature hereby finds, determines and declares that victims of violent crime are often reduced to bereft and destitute circumstances as a result of the criminal acts

perpetrated against them, that the financial or economic resources of such victims and their dependents are in many instances distressed or depleted as a result of injuries inflicted upon them by violent criminals.

That the general social and economic welfare of such victims and their dependents is and ought to be intimately affected with the public interest, that the deplorable plight of these unfortunate citizens should not go unnoticed by our institutions and agencies of government.

The legislature hereby further finds, determines and declares that it is to the benefit of all that victims of violence and their dependents be assisted financially and socially whenever possible.

It is the intent of the legislature of this state to provide a method of compensating and assisting those persons within the state who are innocent victims of criminal acts and who suffer injury or death. To this end, it is the legislature's intention to provide compensation for injuries suffered as a direct result of the criminal acts of other persons. [I.C., § 72-1002, as added by 1986, ch. 337, § 1, p. 824.]

**72-1003. Definitions.** — As used in this chapter:

(1) "Claimant" means any of the following claiming compensation under this chapter:

- (a) A victim;
- (b) A dependent of a deceased victim; or
- (c) An authorized person acting on behalf of any of them, including parent(s), legal guardian(s), and sibling(s), of a victim who is a minor.

(2) "Collateral source" means a source of benefits, other than welfare benefits, or advantages for economic loss otherwise compensable under this chapter which the claimant has received or which is readily available to him from:

- (a) The offender;
- (b) The government of the United States or any agency thereof, a state or any of its political subdivisions, or an instrumentality of two (2) or more states, unless the law providing for the benefits or advantages makes them excess or secondary to benefits under this chapter;
- (c) Social security, medicare, and medicaid;
- (d) Worker's compensation;
- (e) Wage continuation programs of any employer;
- (f) Proceeds of a contract of insurance payable to the claimant for loss which was sustained because of the criminally injurious conduct; or
- (g) A contract, including an insurance contract, providing hospital and other health care services or benefits for disability. Any such contract in this state may not provide that benefits under this chapter shall be a substitute for benefits under the contract or that the contract is a secondary source of benefits and benefits under this chapter are a primary source.

(3) "Commission" means the industrial commission.

(4) "Criminally injurious conduct" means intentional, knowing, or reckless conduct that:

- (a) Occurs or is attempted in this state or occurs outside the state of Idaho against a resident of the state of Idaho and which occurred in a state



which does not have a crime victims compensation program for which the victim is eligible as eligibility is set forth in this statute;

(b) Constitutes an act of terrorism as defined by 18 U.S.C. 2331, committed outside the United States against a resident of this state;

(c) Results in injury or death; and

(d) Is punishable by fine, imprisonment, or death or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state. Criminally injurious conduct does not include conduct arising out of the ownership, maintenance, or use of a motor vehicle except when intended to cause personal injury or death; provided that criminally injurious conduct shall include violations of the provisions of section 18-4006 3(b), 18-8004, 18-8006, 18-8007, 67-7027, 67-7034 or 67-7035, Idaho Code.

(5) "Dependent" means a natural person who is recognized under the law of this state to be wholly or partially dependent upon the victim for care or support and includes a child if under the age of eighteen (18) years or incapable of self-support and unmarried and includes a child of the victim conceived before the victim's death but born after the victim's death, including a child that is conceived as a result of the criminally injurious conduct.

(6) "Extenuating circumstances" means that a victim requires further mental health treatment due to trauma arising out of covered criminal conduct in order to perform major life functions or the activities of daily living.

(7) "Injury" means actual bodily harm or disfigurement and, with respect to a victim, includes pregnancy, venereal disease, mental or nervous shock, or extreme mental distress. For the purposes of this chapter, "extreme mental distress" means a substantial personal disorder of emotional processes, thought or cognition which impairs judgment, behavior or ability to cope with the ordinary demands of life.

(8) "Victim" means a person who suffers injury or death as a result of:

(a) Criminally injurious conduct;

(b) His good faith effort to prevent criminally injurious conduct; or

(c) His good faith effort to apprehend a person reasonably suspected of engaging in criminally injurious conduct.

(9) "Welfare benefits" as used in subsection (2) of this section, shall include sums payable to or on behalf of an indigent person under chapter 35, title 31, Idaho Code. [I.C., § 72-1003, as added by 1986, ch. 337, § 1, p. 824; am. 1987, ch. 226, § 1, p. 479; am. 1989, ch. 52, § 1, p. 64; am. 1990, ch. 16, § 1, p. 25; am. 1996, ch. 416, § 1, p. 1385; am. 1997, ch. 128, § 1, p. 380; am. 2002, ch. 136, § 2, p. 371; am. 2006, ch. 291, § 1, p. 896.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 291, in subsection (5), added "years" following "eighteen (18)"; and added subsection (6), and redesignated the remaining subsections accordingly.

**Effective Dates.** — Section 3 of S.L. 2006, ch. 291 declared an emergency retroactively to July 1, 2005 and approved March 31, 2006.

**72-1004. Powers and duties of commission.** — (1) The commission shall:

(a) Adopt rules to implement this chapter in compliance with chapter 52, title 67, Idaho Code;

(b) Prescribe forms for applications for compensation; and

(c) Determine all matters relating to claims for compensation.

(2) The commission may:

(a) Request and obtain from prosecuting attorneys and law enforcement officers investigations and data to enable the commission to determine whether and the extent to which a claimant qualifies for compensation. A statute providing confidentiality for a claimant's juvenile court records does not apply to proceedings under this chapter;

(b) Subpoena witnesses and other prospective evidence, administer oaths or affirmations, conduct hearings, and receive relevant, nonprivileged evidence;

(c) Take notice of judicially cognizable facts and general, technical, and scientific facts within its specialized knowledge;

(d) Require that law enforcement agencies and officials take reasonable care that victims be informed about the existence of this chapter and the procedure for applying for compensation under this chapter;

(e) Require that any person contracting directly or indirectly with an individual formally charged with or convicted of a qualifying crime for any rendition, interview, statement, or article relating to such crime to deposit any proceeds owed to such individual under the terms of the contract into an escrow fund for the benefit of any victims of the qualifying crime or any surviving dependents of the victim, if such individual is convicted of that crime, to be held for such period of time as the commission may determine is reasonably necessary to perfect the claims of the victims or dependents. If, after all funds due the victim have been paid to the victim under this section, there remain additional funds in the escrow account, such funds shall be returned to the crime victims compensation account; and

(f) Require claimants to sign a release and provide information to determine eligibility for compensation under this chapter. Any information received by the commission pursuant to this subsection shall be kept confidential except as provided in section 72-1007, Idaho Code. [I.C., § 72-1004, as added by 1986, ch. 337, § 1, p. 824; am. 2002, ch. 136, § 3, p. 371.]

**72-1005. Rehabilitation of victims.** — The commission shall refer victims who have been disabled through criminally injurious conduct and who are receiving benefits under this chapter to an appropriate treatment facility or program, including mental health counseling and care. If the referral is to the division of vocational rehabilitation, the division shall provide for the vocational rehabilitation of the victims under its rehabilitation programs to the extent funds are available under such program. [I.C., § 72-1005, as added by 1986, ch. 337, § 1, p. 824.]

**72-1006. Attorneys' fees.** — (1) The commission may grant attorneys' fees to attorneys for representing claimants before the commission. Any



attorney's fee granted by the commission shall be in addition to compensation awarded the claimant under this chapter.

(2) The commission may regulate the amount of the attorney's fee in any claim under this chapter when an attorney is representing a claimant.

(3) In no claim or case may attorney fees in excess of five percent (5%) of the amount paid to a claimant or on his behalf be paid directly or indirectly to a claimant's attorney. [I.C., § 72-1006, as amended by 1986, ch. 337, § 1, p. 824.]

#### RESEARCH REFERENCES

**A.L.R.** — Workers' compensation: availability, rate, or method of calculation of interest on attorney's fees or penalties. 79 A.L.R.5th 201.

**72-1007. Public inspection and disclosure of commission's records.** — The information and records the commission maintains in its possession in the administration of this chapter shall be kept confidential and are exempt from public disclosure under chapter 3, title 9, Idaho Code, provided however:

(1) During the commission's regular office hours any claimant, or his attorney or authorized representative, may examine all files maintained by the commission in connection with his application for compensation;

(2) Upon an adequate showing to the court in a separate civil or criminal action that the specific information or records are not obtainable through diligent effort from any independent source, the court may inspect such records in camera to determine whether the public interest in disclosing the records outweighs the public or private interest in maintaining the confidentiality of such records;

(3) Information and records maintained by the commission may be disclosed to public employees and officials in the performance of their official duties; and

(4) Information and records maintained by the commission may be disclosed to health care providers who are:

- (a) Treating or examining victims claiming benefits under this chapter; or
- (b) Giving medical advice to the commission regarding any claim. [I.C., § 72-1007, as added by 1986, ch. 337, § 1, p. 824; am. 1987, ch. 226, § 2, p. 479; am. 1990, ch. 213, § 108, p. 480; am. 2002, ch. 136, § 4, p. 371.]

#### STATUTORY NOTES

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**72-1008. Limitation of benefit entitlements to proportionate share of available funds.** — Claimants receiving benefits under this chapter are not granted an absolute entitlement to benefits. Benefits must be paid in accordance with the amount of the legislative appropriation. If the commission determines at any time that the appropriated funds for a fiscal year will not be an amount that will fully pay all claims, the commission

may make appropriate proportionate reductions in benefits to all claimants. Such reductions do not entitle claimants to future retroactive reimbursements in future fiscal years unless the legislature makes appropriations for such retroactive benefits. [I.C., § 72-1008, as added by 1986, ch. 337, § 1, p. 824.]

**72-1009. Crime victims compensation account.** — The crime victims compensation account is hereby established in the dedicated fund. Moneys shall be paid into the account as provided by law. Moneys in the account may be appropriated only for the purposes of this chapter, which shall include administrative expenses. [I.C., § 72-1009, as added by 1986, ch. 337, § 1, p. 824.]

**72-1010. Receipt of funds.** — The commission may adopt appropriate rules in order to receive federal funds under federal criminal reparation and compensation acts, or to receive grants, gifts or donations from any source. [I.C., § 72-1010, as added by 1986, ch. 337, § 1, p. 824.]

**72-1011. Penalty for fraudulently obtaining benefits.** — Any person who knowingly makes a false claim or a false statement or uses any other fraudulent device in connection with any claim is guilty of theft as provided in section 18-2403, Idaho Code, and upon conviction shall, in addition to being punished as provided in chapter 24, title 18, Idaho Code, forfeit and repay any compensation paid under this chapter. [I.C., § 72-1011, as added by 1986, ch. 337, § 1, p. 824.]

**72-1012. Application for compensation.** — An applicant for an award of compensation may apply in writing in a form that conforms substantially to that prescribed by the commission. [I.C., § 72-1012, as added by 1986, ch. 337, § 1, p. 824.]

**72-1013. Informal hearings.** — The commission may hold informal hearings in order to make determinations regarding the compensability of a claim. At such hearings, the commission may subpoena witnesses and documents as set forth in section 72-709, Idaho Code. Hearings held under this section are not considered contested case hearings under the Idaho administrative procedures act. However, the commission shall adopt rules regarding the commission's informal hearing procedures. [I.C., § 72-1013, as added by 1986, ch. 337, § 1, p. 824.]

#### JUDICIAL DECISIONS

**Cited in:** *Huntley v. Vessey* (In re Vessey),  
— Bankr. — (Bankr. D. Idaho Jan. 15, 2003).

**72-1014. Evidence of condition.** — (1) The commission may require the claimant to supplement the application with any reasonably available medical reports or other documents relating to the injury or condition for which compensation is claimed. Failure to provide the requested supporting



documents or reports may result in the denial of the claimant's application for compensation or claim for payment. Health care providers are authorized to submit directly to the commission, pursuant to the claimant's original release as provided in the application for compensation, any information that is required to support a claimant's application or that is necessary to process a claim for payment.

(2) If the physical or mental condition of a victim or claimant is material to a claim, the commission may order the victim or claimant to submit from time to time to an examination by a physician or other licensed health professional or may order an autopsy of a deceased victim. The commission shall pay for such examination or autopsy. The order shall specify the time, place, manner, conditions, and scope of the examination or autopsy and the person by whom it is to be made and shall require the person to file with the commission a detailed written report of the examination or autopsy. The report shall set out his findings, including results of all tests made, diagnoses, prognoses, and other conclusions and reports of earlier examinations of the same conditions. On request of the person examined, the commission shall furnish a copy of the report to him. If the victim is deceased, the commission, on request, shall furnish a copy of the report to the claimant. [I.C., § 72-1014, as added by 1986, ch. 337, § 1, p. 824; am. 2002, ch. 136, § 5, p. 371.]

**72-1015. Enforcement of commission's orders — Improper assertion of privilege.** — If a person refuses to comply with an order of the commission or asserts a privilege to withhold or suppress evidence relevant to a claim, except privileges arising from the attorney-client relationship or counselor-client relationship, the commission may make any just order, including denial of the claim. [I.C., § 72-1015, as added by 1986, ch. 337, § 1, p. 824.]

**72-1016. Limitations on awards.** — (1) Compensation may not be awarded unless the claim is filed with the commission within one (1) year after the day the criminally injurious conduct occurred causing the injury or death upon which the claim is based. The time for filing a claim may be extended by the commission for good cause shown.

(2) Compensation may not be awarded to a claimant who is the offender or an accomplice of the offender or to any claimant if the award would unjustly benefit the offender or accomplice.

(3) Compensation may not be awarded unless the criminally injurious conduct resulting in injury or death was reported to a law enforcement officer within seventy-two (72) hours after its occurrence or the commission finds there was good cause for the failure to report within that time.

(4) In order to be entitled to benefits under this chapter, a claimant must fully cooperate with all law enforcement agencies and prosecuting attorneys in the apprehension and prosecution of the offender causing the criminally injurious conduct. The commission, upon finding that the claimant or victim has not fully cooperated with appropriate law enforcement agencies or prosecuting attorneys, may deny or reconsider and reduce an award of compensation.

(5) Compensation otherwise payable to a claimant shall be reduced or denied to the extent the compensation benefits payable are or can be recouped from collateral sources.

(6) Persons serving a sentence of imprisonment or residing in any other public institution which provides for the maintenance of such person are not entitled to the benefits of this chapter.

(7)(a) Compensation may be denied or reduced if the victim contributed to the infliction of death or injury with respect to which the claim is made. Any reduction in benefits under this subsection shall be in proportion to what the commission finds to be the victim's contribution to the infliction of death or injury.

(b) Compensation otherwise payable to a claimant shall be reduced by fifty percent (50%) if at the time the injury was incurred claimant was engaged in a felony or was in violation of section 18-8004 or 67-7034, Idaho Code, and compensation otherwise payable may be further reduced pursuant to regulation of the industrial commission if claimant's actions contributed to the injury. [I.C., 72-1016, as added by 1986, ch. 337, § 1, p. 824; am. 1990, ch. 15, § 1, p. 25; am. 1993, ch. 278, § 2, p. 940; am. 2002, ch. 136, § 6, p. 371.]

**72-1017. Tentative award of compensation.** — If the commission determines that the claimant will suffer financial hardship unless a tentative award is made and it appears likely that a final award will be made, an amount may be paid to the claimant, to be deducted from the final award or repaid by and recoverable from the claimant to the extent that it exceeds the final award. [I.C., § 72-1017, as added by 1986, ch. 337, § 1, p. 824.]

**72-1018. Award of compensation.** — (1) The commission shall award compensation benefits under this chapter, if satisfied by a preponderance of the evidence that the requirements for compensation have been met.

(2) An award may be made whether or not any person is prosecuted or convicted. Proof of conviction of a person whose acts give rise to a claim is conclusive evidence that the crime was committed unless an application for rehearing or an appeal of the conviction is pending or a rehearing or new trial has been ordered.

(3) The commission may suspend the proceedings pending disposition of a criminal prosecution that has been commenced or is imminent and may make a tentative award under section 72-1017, Idaho Code. [I.C., § 72-1018, as added by 1986, ch. 337, § 1, p. 824.]

**72-1019. Compensation benefits.** — (1) A claimant is entitled to weekly compensation benefits when the claimant has a total actual loss of wages due to injury as a result of criminally injurious conduct. During the time the claimant seeks such weekly benefits, the claimant, as a result of such injury, must have no reasonable prospect of being regularly employed in the normal labor market. The weekly benefit amount is sixty-six and two-thirds percent (66 2/3%) of the wages received at the time of the criminally injurious conduct, subject to a maximum of one hundred seventy-



five dollars (\$175). Weekly compensation payments shall be made at the end of each two (2) week period. No weekly compensation payments may be paid for the first week after the criminally injurious conduct occurred, but if total actual loss of wages continues for one (1) week, weekly compensation payments shall be paid from the date the wage loss began. Weekly compensation payments shall continue until the claimant has a reasonable prospect of being regularly employed in the normal labor market.

(2) The commission may order payment of reasonable expenses actually incurred by the claimant for reasonable services by a physician or surgeon, reasonable hospital services and medicines, mental health counseling and care, and such other treatment as may be approved by the commission for the injuries suffered due to criminally injurious conduct. Payment for the costs of forensic and medical examinations of alleged victims of sexual assault performed for the purposes of gathering evidence for possible prosecution, after collections from any third party who has liability, shall be made by the commission. The commission shall establish a procedure for summary processing of such claims.

(3)(a) The dependents of a victim who is killed as a result of criminally injurious conduct are entitled to receive aggregate weekly benefits amounting to sixty-six and two-thirds percent (66 2/3%) of the wages received at the time of the criminally injurious conduct causing the death, subject to a maximum of one hundred seventy-five dollars (\$175) per week. Weekly compensation payments shall be made at the end of each two (2) week period.

(b) Benefits under subsection (3)(a) of this section shall be paid to the spouse for the benefit of the spouse and other dependents unless the commission determines that other payment arrangements should be made. If a spouse dies or remarries, benefits under subsection (3)(a) shall cease to be paid to the spouse but shall continue to be paid to the other dependents so long as their dependent status continues.

(4) Reasonable funeral and burial or cremation expenses of the victim, together with actual expenses of transportation of the victim's body, shall be paid in an amount not exceeding five thousand dollars (\$5,000) if all other collateral sources have properly paid such expenses but have not covered all such expenses.

(5)(a) Compensation payable to a victim and all of the victim's dependents in cases of the victim's death, because of injuries suffered due to an act or acts of criminally injurious conduct involving the same offender and occurring within a six (6) month period, may not exceed twenty-five thousand dollars (\$25,000) in the aggregate.

(b) The limitation of subsection (5)(a) of this section is subject to the further limitation that payments for mental health treatment received as a result of the victim's injury may not exceed two thousand five hundred dollars (\$2,500) unless the industrial commission finds extenuating circumstances. If the commission finds a victim to have extenuating circumstances as defined in section 72-1003, Idaho Code, the victim is eligible for payments up to the maximum benefit allowed under paragraph (a) of this subsection (5). The commission shall reevaluate the

victim's qualifications for extenuating circumstances not less often than annually.

(6) Compensation benefits are not payable for pain and suffering or property damage.

(7)(a) A person who has suffered injury as a result of criminally injurious conduct and as a result of such injury has no reasonable prospect of being regularly employed in the normal labor market, who was employable but was not employed at the time of such injury, may in the discretion of the commission be awarded weekly compensation benefits in an amount determined by the commission not to exceed one hundred fifty dollars (\$150) per week. Weekly compensation payments shall continue until the claimant has a reasonable prospect of being regularly employed in the normal labor market or for a shorter period as determined by the commission. The claimant shall be awarded benefits as provided in subsection (2) of this section.

(b) The dependents of a victim who is killed as a result of criminally injurious conduct and who was employable but not employed at the time of death, may, in the discretion of the commission, be awarded, in an aggregate amount payable to all dependents, a sum not to exceed one hundred fifty dollars (\$150) per week which shall be payable in the manner and for the period provided by subsection (3)(b) of this section or for such shorter period as determined by the commission. The claimant shall be awarded benefits as provided in subsection (4) of this section.

(c) Compensation payable to a victim or a victim's dependents under this subsection may not exceed twenty thousand dollars (\$20,000), and the limitations of subsection (6) of this section apply to compensation under this subsection (7).

(8) Amounts payable as weekly compensation may not be commuted to a lump sum and may not be paid less frequently than every two (2) weeks.

(9)(a) Subject to the limitations in subsections (9)(b) and (9)(c) of this section, the spouse, parent, grandparent, child, grandchild, brother or sister of a victim who is killed, kidnapped, sexually assaulted or subjected to domestic violence or child injury is entitled to reimbursement for mental health treatment received as a result of such criminally injurious conduct.

(b) Total payments made under subsection (9)(a) of this section, may not exceed five hundred dollars (\$500) for each person or one thousand five hundred dollars (\$1,500) for a family.

(c) With regard to claims filed pursuant to this section, in order for family members of victims of crime to be entitled to benefits, the victim of the crime must also have been awarded benefits for the crime itself.

(10) A claimant or a spouse, parent, child or sibling of a claimant or victim may be reimbursed for his or her expenses for necessary travel incurred in connection with obtaining benefits covered pursuant to this chapter and in accordance with rules of the commission. [I.C., § 72-1019, as added by 1986, ch. 337, § 1, p. 824; am. 1991, ch. 246, § 1, p. 601; am. 1993, ch. 278, § 3, p. 940; am. 2001, ch. 144, § 2, p. 512; am. 2002, ch. 136, § 7, p. 371; am. 2005, ch. 109, § 1, p. 359; am. 2006, ch. 291, § 2, p. 896.]



## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 291, in subsection (5)(b), deleted “pursuant to regulation of the industrial commission” following “extenuating circumstances,” and added the last two sentences.

**Compiler’s Notes.** — Section 72-1026 provided that the provisions of chapter 10 of title 72 be repealed effective June 30, 1991. How-

ever, said section was repealed by § 1 of S.L. 1991, ch. 4 effective July 1, 1991. Therefore chapter 72-10 was not repealed effective June 30, 1991.

**Effective Dates.** — Section 3 of S.L. 2006, ch. 291 declared an emergency retroactively to July 1, 2005 and approved March 31, 2006.

**72-1020. Award not subject to execution, attachment, garnishment, or assignment — Exception.** — (1) An award is not subject to execution, attachment, garnishment, or other process.

(2) An assignment or agreement to assign a right to compensation in the future is unenforceable except:

(a) An assignment of a right to compensation for work loss to secure payment of maintenance or child support; or

(b) An assignment of a right to compensation to the extent that the benefits are for the cost of products, services, or accommodations necessitated by the injury or death on which the claim is based and are provided or to be provided by the assignee. [I.C., § 72-1020, as added by 1986, ch. 337, § 1, p. 824.]

**72-1021. Reconsideration and review of commission’s decisions.**

— (1) The commission, on its own motion or on request of the claimant, may reconsider a decision making or denying an award or determining its amount. The commission shall reconsider at least annually every award being paid in installments. An order on reconsideration of an award may not require refund of amounts previously paid unless the award was obtained by fraud.

(2) The right of reconsideration does not affect the finality of a commission decision. [I.C., § 72-1021, as added by 1986, ch. 337, § 1, p. 824.]

**72-1022. No appeal.** — There shall be no right of appeal from a final determination of the commission. [I.C., § 72-1022, as added by 1986, ch. 337, § 1, p. 824.]

**72-1023. Subrogation.** — (1) If a claimant seeks compensation under this chapter and compensation is awarded, the account is entitled to full subrogation against a judgment or recovery received by the claimant against the offender or from or against any other source for all compensation paid under this chapter. The account’s right of subrogation shall be a first lien on the judgment or recovery. If the claimant does not institute the action against the offender or against another source from which payment may be recovered for benefits compensable under this chapter within one (1) year from the date the criminally injurious conduct occurred, the commission may institute the action in the name of the claimant or the claimant’s personal representative.

(2) If the claimant institutes the action, the commission shall pay a proportional share of costs and attorneys’ fees if it recovers under its subrogation interest.

(3) If the commission institutes the action in the name of the claimant or the claimant's personal representative and the recovery is in excess of the amount of compensation paid to the claimant and costs incurred by the account in pursuit of the action, the excess shall be paid to the claimant.

(4) If a judgment or recovery includes both damages for bodily injury or death for which the commission has ordered compensation paid under this chapter and damages for which the commission has not ordered compensation paid, then the account's subrogation interest shall apply only to that proportion of the judgment or recovery for which it has paid compensation. In a civil action in a court of this state arising out of criminally injurious conduct, the judge, on timely motion, shall direct the jury to return a special verdict indicating separately the amounts of the various items of damages awarded. A claimant may not make recoveries against the offender or other source from which payment can be recovered for benefits compensable under this chapter in such a way as to avoid and preclude the account from receiving its proper subrogation share as provided in this section. The commission shall order the release of any lien provided for in subsection (1) of this section upon receipt of the account's subrogation share.

(5) Moneys received under the provisions of this section shall be paid to the account. [I.C., § 72-1023, as added by 1986, ch. 337, § 1, p. 824; am. 1988, ch. 73, § 1, p. 105.]

**72-1024. Effect of award on probation and parole of offender. —**

(1) When placing any convicted person on probation, the court may set as a condition of probation the payment to the account of an amount equal to any benefits paid from the account to or for the benefit of a victim or a victim's dependents. The court may set a repayment schedule and modify it as circumstances change.

(2) Payment of the debt may be made a condition of parole subject to modification based on a change in circumstances. [I.C., § 72-1024, as added by 1986, ch. 337, § 1, p. 824; am. 1987, ch. 226, § 3, p. 479; am. 1997, ch. 112, § 2, p. 272.]

**72-1025. Fines — Reimbursements — Priority — Disposition. —**

(1) In addition to any other fine which may be imposed upon each person found guilty of criminal activity, the court shall impose a fine or reimbursement according to the following schedule, unless the court orders that such fine or reimbursement be waived only when the defendant is indigent and at the time of sentencing shows good cause for inability to pay and written findings to that effect are entered by the court:

(a) For each conviction or finding of guilt of each felony count, a fine or reimbursement of not less than fifty dollars (\$50.00) per felony count;

(b) For each conviction or finding of guilt of each misdemeanor count, a fine or reimbursement of twenty-five dollars (\$25.00) per misdemeanor count;

(c) In addition to any fine or reimbursement ordered under subsection (a) or (b) above, the court shall impose a fine or reimbursement of not less than two hundred dollars (\$200) per count for any conviction or finding of



guilt for any sex offense, including, but not limited to, offenses pursuant to sections 18-1506, 18-1507, 18-1508, 18-1508A, 18-6101, 18-6108, 18-6605 and 18-6608, Idaho Code.

(2) The fine or reimbursement imposed under the provisions of this section shall have priority over all other judgments of the court, except an order to pay court costs.

(3) Notwithstanding the provisions of section 19-4705, Idaho Code, the fines or reimbursements imposed under the provisions of this section shall be paid into the crime victims compensation account. [I.C., § 72-1025, as added by 1986, ch. 337, § 1, p. 824; am. 1987, ch. 137, § 1, p. 270; am. 1989, ch. 50, § 1, p. 63; am. 1993, ch. 278, § 1, p. 940.]

### JUDICIAL DECISIONS

**Cited in:** State v. Korsen, 141 Idaho 445, 111 P.3d 130 (2005).

### 72-1026. Repeal. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 72-1026, as added by 1986, ch. 337, § 1, p. 824, was repealed by S.L. 1991, ch. 4, § 1. Therefore, chapter 72-10 will not be repealed effective June 30, 1991.

## CHAPTERS 11, 12

[RESERVED]

## PART II

### CHAPTER 13

### EMPLOYMENT SECURITY LAW

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- 72-1380. [Repealed.]
- 72-1381. Director to cooperate with governor in mediation of disputes.
- 72-1382. Duties of director — Determination of representatives.
- 72-1383. [Repealed.]
- 72-1384. [Repealed.]
- 72-1385. Provisions not to apply to agricultural or domestic labor.

**72-1301. Short title.** — This act shall be known as the "Employment Security Law." [1947, ch. 269, § 1, p. 793; am. 1949, ch. 144, § 1, p. 252; am. 1998, ch. 1, § 1, p. 3.]



## STATUTORY NOTES

**Compiler's Notes.** — The first Unemployment Compensation Law was enacted at the third extra session of the twenty-third session of the State Legislature, 1936, S.L. 1937, ch. 12, p. 20, and was amended by S.L. 1937, chs. 9, 183, 187 and 188; S.L. 1939, chs. 202, 203 and 239; S.L. 1941, chs. 65, 175 and 182; and S.L. 1943, chs. 29, 68 and 92: such law as amended was repealed by S.L. 1945, chs. 203, § 11, which ch. 203 of S.L. 1945 enacted a second Unemployment Compensation Law in its place. This law, in turn, was repealed by

§ 79 of S.L. 1947, ch. 269. The law enacted by S.L. 1947, ch. 269 is designated as the Employment Security Law.

Chapter 144 of S.L. 1949 purported to amend S.L. 1947, ch. 269, §§ 72-1301 — 72-1379. It simply reenacted §§ 72-1301 — 72-1314, 72-1316 — 72-1351, 72-1353 — 72-1357, 72-1369 — 72-1378.

The words "this act" refer to S.L. 1947, ch. 269, as amended, which is compiled as §§ 72-1301 — 72-1379.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.  
Discharge of employee.  
Findings.  
Liberal construction.  
Proof of eligibility.  
Purpose of act.  
Refusal to work.

### Construction.

Employment Security Law must be construed in favor of taxpayer. *In re Potlatch Forests, Inc.*, 72 Idaho 291, 240 P.2d 242 (1952).

### Discharge of Employee.

Court affirmed denial of unemployment benefits where the Industrial Commission's final decision was that the statements which were made by the employer during a heated argument were not statements which would reasonably be interpreted as discharging the claimant. *Porter v. Gem State Plumbing*, 119 Idaho 54, 803 P.2d 555 (1990).

### Findings.

Where it was clear from the evidence that the board's findings of wilful disregard of employer's interest by employee was supported by substantial evidence, such findings would not be disturbed on appeal. *Seymour v. Potlatch Forests, Inc.*, 94 Idaho 224, 486 P.2d 79 (1971).

### Liberal Construction.

The Employment Security Law must be liberally construed to the end that its purpose be accomplished as the primary function in construing the statute is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961).

### Proof of Eligibility.

Burden of proof is on the claimant to show eligibility for unemployment benefits. *Turner*

*v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956); *McMunn v. Department of Public Lands*, 94 Idaho 493, 491 P.2d 1265 (1971).

### Purpose of Act.

The purpose of this act is humanitarian, and it seeks the prevention of the economic ills arising out of unemployment and provides unemployment benefits to those unemployed through no fault of their own; to that end it should be liberally extended to all those who can be held to come within its purview. *In re Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950).

The Employment Security Act is social legislation, designed to alleviate economic insecurity and to relieve hardships resulting from involuntary unemployment. It was intended to provide benefits for those unemployed under prescribed conditions who are willing and able to work but unable to secure a suitable employment on the labor market. *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

### Refusal to Work.

Where one has a suitable employment and refuses to work under reasonable regulations and conditions, and pursuant to reasonable directives of management, such person is not entitled to unemployment benefits. *Seymour v. Potlatch Forests, Inc.*, 94 Idaho 224, 486 P.2d 79 (1971).

**Cited in:** *Appeal of MacKenzie Auto. Equip. Co.*, 71 Idaho 362, 232 P.2d 130 (1951); *In re Central Eureka Corp.*, 76 Idaho 287, 281 P.2d 665 (1955); *Wolfgang v. Employment*

Sec. Agency, 77 Idaho 298, 291 P.2d 279 (1955); Eytchison v. Employment Sec. Agency, 77 Idaho 448, 294 P.2d 593 (1956); Chester B. Brown Co. v. Employment Sec. Agency, 78 Idaho 166, 299 P.2d 487 (1956); Hatch v. Employment Sec. Agency, 79 Idaho 246, 313 P.2d 1067 (1957); Clark v. Bogus Basin Recreational Ass'n, 91 Idaho 916, 435 P.2d 256 (1967); Department of Emp. v. Ada County

Fair Bd., 96 Idaho 591, 532 P.2d 933 (1974); Totusek v. Department of Emp., 96 Idaho 699, 535 P.2d 672 (1975); Avery v. B & B Rental Toilets, 97 Idaho 611, 549 P.2d 270 (1976); Gary v. Nichols, 447 F. Supp. 320 (D. Idaho 1978); Nampa Christian Schools Found., Inc. v. State ex rel. Department of Emp., 110 Idaho 918, 719 P.2d 1178 (1986).

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Cash advances.

Payments.

Revolving fund.

Rules of procedure.

Transfer of administration.

#### Cash Advances.

No new or additional fund was brought into existence by the state board of examiners in allowing a requisition for cash advances of the industrial accident board pursuant to the amount of appropriation made by the legislature. Suppiger v. Enking, 60 Idaho 292, 91 P.2d 362 (1939).

The extension of credit by the state, inhibited under the constitution, was credit extended to private sources to promote private schemes. The inherent and official governmental nature of the service, for which the expenditure was made and for which an advance was allowed, determined its character as not giving or loaning credit to the state. Suppiger v. Enking, 60 Idaho 292, 91 P.2d 362 (1939).

#### Payments.

Money paid out had to be passed upon by the state board of examiners. State ex rel. Taylor v. Robinson, 59 Idaho 485, 83 P.2d 983 (1938).

The fact that the state board of examiners did not have the skill and necessary clerical and executive help to properly pass upon claims and unemployment compensation would not justify the dispensing with the

constitutional requirement that the state board of examiners pass upon such claims. State ex rel. Taylor v. Robinson, 59 Idaho 485, 83 P.2d 983 (1938).

#### Revolving Fund.

Under the revolving fund statutes, setting aside of a fund for cash advances of the industrial accident board did not constitute an unlawful withdrawal of money from the treasury as not pursuant to an appropriation, since the appropriation as made by the legislature remained the limit of expenditure. Suppiger v. Enking, 60 Idaho 292, 91 P.2d 362 (1939).

#### Rules of Procedure.

Strict rules of procedure were not required in proceeding for unemployment compensation benefits, and where the evidence furnished by claimant was not satisfactory, the board should have made further and individual investigation. Hagadone v. Kirkpatrick, 66 Idaho 55, 154 P.2d 181 (1944).

#### Transfer of Administration.

The functions for administration of the Unemployment Compensation Law were transferred from the department of finance to the industrial accident board. Robison v. Enking, 58 Idaho 24, 69 P.2d 603 (1937).

#### RESEARCH REFERENCES

**Am. Jur.** — 48 Am. Jur. 2d, Labor, § 516 et seq.

**72-1302. Declaration of state public policy.** — The public policy of this state is as follows: Economic insecurity due to unemployment is a serious threat to the well-being of our people. Unemployment is a subject of national and state concern. This chapter addresses this problem by encouraging employers to offer stable employment and by systematically accumulating funds during periods of employment to pay benefits for periods of



unemployment. The legislature declares that the general welfare of our citizens requires the enactment of this measure and sets aside unemployment reserves to be used for workers who are unemployed through no fault of their own. [1947, ch. 269, § 2, p. 793; am. 1949, ch. 144, § 2, p. 252; am. 1998, ch. 1, § 2, p. 3.]

## JUDICIAL DECISIONS

### ANALYSIS

Agricultural employers.  
Calculation of wages.  
Construction.  
Coverage.  
Determination of unemployment.  
Joint enterprise.  
Policy.  
Preparing poultry for market.  
Purpose of act.  
Standing.  
Sufficiency of evidence.  
Termination as a result of resignation.  
Voluntarily leaving.  
Wrongdoing of employee.

#### **Agricultural Employers.**

It was reasonable for the legislature to exempt agricultural employers, but not exempt seasonal lawn sprinkler installation employers from the payment of unemployment compensation taxes, since the legislature may reasonably have determined that agricultural employment is inherently more unstable than nonagricultural employment and hence directed its efforts toward the nonagricultural market as being more likely to succeed while opting to deal with the agricultural labor market at a later time. *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).

#### **Calculation of Wages.**

The amount of traveling expenses incurred by collectors may, under the proper circumstances, represent an amount paid as a reimbursement for business expenses for which a deduction from the gross commission is permitted in calculating wages for the purpose of the employment security law. *Department of Emp. v. Kasum Communications*, 97 Idaho 372, 544 P.2d 1142 (1976).

#### **Construction.**

As between employer and employee the Employment Security Law is not to be construed in favor of either. *Custom Meat Packing Co. v. Martin*, 85 Idaho 374, 379 P.2d 664 (1963).

#### **Coverage.**

Shoe salesman who frequently left work during the day and did not report for work on other occasions and who was discharged was

not entitled to employment benefits since he was guilty of misconduct and left his employment voluntarily without just cause, as fund must be protected to take care of employees who are without jobs in time of general unemployment. *Doran v. Employment Sec.* 75 Idaho 94, 267 P.2d 628 (1954).

#### **Determination of Unemployment.**

Availability for resumption of regular job, hours per week devoted to questioned activity, net income earned by the activity, nature of regular job and whether applicant engages in the same activity while working his regular job are factors in accord with public policy which may be considered in judging whether applicant is self employed or unemployed. *Corwin v. Sunshine Mining Co.*, 96 Idaho 211, 525 P.2d 993 (1974).

#### **Joint Enterprise.**

The conclusion of the industrial accident board after examining the record and evidence before it that the arrangement of the lessee of a cafe and the appellant as regards the operation of the cafe during the time in question was neither an employer-employee arrangement nor a lease, but was a joint undertaking, was supported by the evidence of the appellant's activities in the operation of the cafe. *In re Orbea*, 84 Idaho 298, 372 P.2d 132 (1962).

#### **Policy.**

The policy underlying the employment security law is to encourage stable employment and to provide compensation to unemployed persons and to alleviate their burdens

brought about by periods of unemployment. *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975).

Despite an employer's contention that the imposition of the unemployment compensation tax upon him was arbitrary since neither he nor his employees received any benefit therefrom, indirect benefits were received from increasing the stability of the employer-employee climate throughout the state, as well as a reduced strain on the welfare system. But even assuming his assertion to be correct, employers are rated as to the number of their employees who receive fewest unemployment benefits, and therefore, there is an attempt at least to require employers who are most responsible for involuntary unemployment to bear a higher burden of the cost. *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).

While the language of this section may be an expression of legislative policy, it does not rise to the level of a statement of public policy which would prevent an employer from discharging an employee at will. *Ray v. Nampa Sch. Dist.*, 120 Idaho 117, 814 P.2d 17 (1991).

#### **Preparing Poultry for Market.**

Where it is evident that the primary purpose of employer's poultry business is to produce, hatch, raise and sell poultry and the various components of the corporation constitute a single integrated farming venture, and that the processing plant is incidental to the total farming enterprise, an employee of the processing plant cannot qualify under the employment security act. *Etchechoury v. Avi-Simplot, Inc.*, 93 Idaho 438, 462 P.2d 737 (1969).

#### **Purpose of Act.**

The intent and purpose of the state government in enacting the unemployment compensation statute was not to raise money for revenue purposes, but to raise money to do away with unemployment. In re *Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950).

The purpose of this act should not be thwarted in the name of uniformity by extending the meaning of the phrase "services performed in the employ" of an exempt organization to include services performed for all its sources of income. In re *Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950).

Purpose of employment security law, was to provide relief in event of involuntary unemployment of workers. In re *Potlatch Forests, Inc.*, 72 Idaho 291, 240 P.2d 242 (1952).

The Employment Security Act is social legislation, designed to alleviate economic insecurity and to relieve hardships resulting from involuntary unemployment. It was intended to provide benefits for those unemployed un-

der prescribed conditions who are willing and able to work but unable to secure a suitable employment on the labor market. *Johns v. S. H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

The policy of the law is to encourage the employer and employee to adjust their differences and thus avoid interrupting the employment. *Custom Meat Packing Co. v. Martin*, 85 Idaho 374, 379 P.2d 664 (1963).

By adopting the employment security law, the legislature has sought to encourage stability of employment, and one of the methods which the legislature has adopted in accomplishing that purpose is to discourage voluntary termination of employment without "good cause." *Pyeatt v. Idaho State Univ.*, 98 Idaho 424, 565 P.2d 1381 (1977).

The Idaho Employment Security Act was enacted to help alleviate the economic and social hardships caused by unemployment which did not result from the fault of the employee. *Smith v. Department of Emp.*, 100 Idaho 520, 602 P.2d 18 (1979).

If the purpose of the Idaho Employment Security Act is to promote economic security and to provide benefits during periods of economic unemployment, such purpose is frustrated by a finding that, because an employee voluntarily left his employment prior to an effective firing date, that such leaving prevents the claimant from ever becoming eligible for benefits as of the date he became involuntarily unemployed. *McCammon v. Yellowstone Co.*, 100 Idaho 926, 607 P.2d 434 (1980).

The Employment Security Act was enacted to alleviate the hardships of involuntary unemployment and will be construed liberally to effectuate that purpose. *Davenport v. State, Dep't of Emp.*, 103 Idaho 492, 650 P.2d 634 (1982).

#### **Standing.**

Where in an action by an employer to have his business exempted from unemployment compensation taxes, there was no evidence indicating that the employees do or would seek to have their employer's business exempted from unemployment compensation taxes and the employees were not parties to the action, the employer had no standing to argue that requiring him as a "covered employer" to pay such taxes violated the constitutional equal protection rights of his employees. *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).

#### **Sufficiency of Evidence.**

Findings of fact of the industrial accident board in a proceeding instituted under the employment security law when supported by substantial though conflicting evidence will not be disturbed on appeal. In re *Orbea*, 84 Idaho 298, 372 P.2d 132 (1962).



**Termination as a Result of Resignation.**

Where employee gave employer a two-week notice of resignation and the employer rejected the resignation and discharged her instead, eligibility for unemployment benefits should have been based on both periods of separation consistent with § 72-1366(5) and IDAPA 09.01.30.476.03. *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001).

**Voluntarily Leaving.**

When an employee voluntarily terminates employment and seeks unemployment benefits, it is incumbent upon him to show that the termination was based on "good cause" as required under § 72-1366. *McMunn v. Department of Public Lands*, 94 Idaho 493, 491 P.2d 1265 (1971).

**Wrongdoing of Employee.**

An employee discharged from the postal service because of conviction of lewd conduct with minor or child under sixteen was not "unemployed through no fault of his own" within the meaning of this section, as an employer has the right to expect his employ-

ees to refrain from acts which would bring dishonor on the business name or the institution. *O'Neal v. Employment Sec. Agency*, 89 Idaho 313, 404 P.2d 600 (1965).

**Cited in:** *Mandes v. Employment Sec. Agency*, 74 Idaho 23, 255 P.2d 1049 (1953); *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954); *Hatch v. Employment Sec. Agency*, 79 Idaho 246, 313 P.2d 1067 (1957); *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961); *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965); *Oliver v. Creamer Heating & Appliance Co.*, 91 Idaho 312, 420 P.2d 795 (1966); *Alder v. Mountain States Tel. & Tel. Co.*, 92 Idaho 506, 446 P.2d 628 (1968); *Etchechoury v. Avi-Simplot, Inc.*, 93 Idaho 438, 462 P.2d 737 (1969); *Toland v. Schneider*, 94 Idaho 556, 494 P.2d 154 (1972); *Gary v. Nichols*, 447 F. Supp. 320 (D. Idaho 1978); *King v. State, Dep't of Emp.*, 110 Idaho 312, 715 P.2d 982 (1986); *Software Assocs. v. State, Dep't of Emp.*, 110 Idaho 315, 715 P.2d 985 (1986); *Hine v. Twin Falls County*, 114 Idaho 244, 755 P.2d 1282 (1988).

## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Construction.  
Coverage.

**Construction.**

The provisions of former act were to be liberally construed so as to accomplish its purpose. *Hagadone v. Kirkpatrick*, 66 Idaho 55, 154 P.2d 181 (1944).

**Coverage.**

In determining the question of coverage

under the Unemployment Compensation Law, the legislature clearly expressed the intent that the provisions of such law should govern and not the common-law test of master and servant. *Continental Oil Co. v. Unemployment Comp. Div.*, 68 Idaho 194, 192 P.2d 599 (1947).

**72-1303. Definitions.** — Unless the context clearly requires otherwise, these terms shall have the following meanings when used in this chapter. [1947, ch. 269, § 3, p. 793; am. 1949, ch. 144, § 3, p. 252; am. 1998, ch. 1, § 3, p. 3.]

## JUDICIAL DECISIONS

## DECISIONS UNDER PRIOR LAW

**Construction.**

The Unemployment Compensation Law had to be liberally construed to the end that

its purposes be accomplished. *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947).

**72-1304. Agricultural labor.** — (1) "Agricultural labor" means all services performed:

(a) On a farm, in the employ of any person in connection with cultivating the soil, or raising or harvesting any agricultural, aquacultural or

horticultural commodities, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, fish, poultry, and fur-bearing animals and wildlife;

(b) In the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane if the major part of such service is performed on a farm;

(c) In connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit and used exclusively for supplying and storing water, at least ninety percent (90%) of which was ultimately delivered for agricultural purposes during the preceding calendar year; and

(d) In the employ of any farm operator or group of operators, organized or unorganized, in handling, planting, drying, packing, packaging, eviscerating, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market in its unmanufactured state any agricultural, aquacultural or horticultural commodities, if such operator or group, in both the current and preceding calendar years produced more than one-half ( $\frac{1}{2}$ ) of the commodities with respect to which such service is performed.

This subsection is not applicable to services performed in commercial canning, freezing, or dehydrating, or in connection with any agricultural, aquacultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

(2) "Farm" includes stock, dairy, fish, poultry, fruit, fur-bearing animal and truck farms, plantations, ranches, nurseries, hatcheries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural, aquacultural or horticultural commodities, and orchards.

(3) "Unmanufactured state" means retention of its original form and substance.

(4) "Terminal market" means a place of business to which products are shipped in a sorted, graded, packaged condition, ready for immediate sale. [1947, ch. 269, § 4, p. 793; am. 1949, ch. 144, § 4, p. 252; am. 1951, ch. 235, § 1, p. 472; am. 1971, ch. 142, § 1, p. 595; am. 1972, ch. 344, § 1, p. 998; am. 1973, ch. 257, § 1, p. 508; am. 1981, ch. 254, § 1, p. 544; am. 1982, ch. 326, § 3, p. 807; am. 1996, ch. 63, § 1, p. 185; am. 1998, ch. 1, § 4, p. 3; am. 1998, ch. 83, § 1, p. 292.]

#### STATUTORY NOTES

**Amendments.** — This section was amended by two 1998 acts — ch. 1, § 4, effective July 1, 1998 and ch. 83, § 1, effective March 18, 1998, which do not conflict and have been compiled together.

The 1998 amendment, by ch. 1, § 4, renumbered as present subsections (1), (a), (b), (c), (d), (2), (3), and (4) former subsections (a), (1), (2), (3), (4), (b), (c), (d); deleted subsection (5); in present subsection (a), deleted "in connec-

tion with" preceding "raising or harvesting any agricultural,"; at the beginning of subsection (d), inserted "In the employ of any farm operator or group of operators, organized or unorganized, in"; deleted "but only" following "horticultural commodities,"; inserted "or group," following "if such operator"; substituted "years" for "year" preceding produced more than one-half"; in the present paragraph following present subsection (d), substi-



tuted "This subsection is not applicable to services performed in commercial canning, freezing or dehydration" for "The provisions in subsection (a)(4) and (a)(5) shall not be deemed to be applicable with respect to service performed in connection with any agricultural, aquacultural or horticultural commodity"; in present subsection (2), substituted "Farm" includes stock, dairy, fish"; for "As used in subsection (a), the term"; in subsection (3), substituted "Unmanufactured state" for "For purposes of subsection (a), the term"; and in present subsection (4), substituted "Terminal market" for "For purposes of subsection (a), the term."

The 1998 amendment, by ch. 83, § 1, in

subsection (c), substituted " , at least ninety percent (90%) of which was ultimately delivered for agricultural purposes during the preceding calendar year" for "for farming purposes."

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1996, ch. 63 declared an emergency and provided that the act should be in full force and approval on and after passage and approval retroactive to January 1, 1996. Approved March 5, 1996.

Section 2 of S.L. 1998, ch. 83 declared and emergency. Approved March 18, 1998.

## JUDICIAL DECISIONS

### ANALYSIS

Cleaning beans.  
Cooperative organizations.  
Farm operator.  
Preparing poultry for market.  
Processing farm products.  
Question of type of service.  
Spraying.

#### **Cleaning Beans.**

The cleaning and processing of edible beans and peas is agricultural labor and is exempt from employment security payroll tax as "agricultural labor" even though the company purchases some of the peas and beans, where the company imposed a charge on the farmer for processing and cleaning whether beans and peas were held for redelivery or purchase. *Chester B. Brown Co. v. Employment Sec. Agency*, 78 Idaho 166, 299 P.2d 487 (1956).

#### **Cooperative Organizations.**

An employer bears the burden of establishing that it comes within the cooperative organization exemption from making unemployment insurance contributions. *Henggeler Packing Co., Inc. v. Department of Emp.*, 96 Idaho 392, 529 P.2d 1264 (1974).

Where the record revealed that employer possessed many of the characteristics found in cooperative associations but did not contain a history of the rebates or the percentage of profits retained or distributed there was insufficient evidence to conclude that it was a cooperative. *Henggeler Packing Co., Inc. v. Department of Emp.*, 96 Idaho 392, 529 P.2d 1264 (1974).

#### **Farm Operator.**

An employer which does not raise any of the commodities that are processed in its packing and storage facilities is not a farm operator under subsection (a)(4) [now (1)(d)] of this

section. *Henggeler Packing Co., Inc. v. Department of Emp.*, 96 Idaho 392, 529 P.2d 1264 (1974).

#### **Preparing Poultry for Market.**

Although the employing corporation engaged in the slaughter, processing, and packaging of chickens for market obtained most of its chickens from a hatching corporation owned by the same family which owned the employing corporation, such corporation was not engaged in agriculture as defined in clause (4) of subsection (a) [now (1)(d)] of this section. *Lowe v. Bertie's Poultry Farms, Inc.*, 91 Idaho 695, 429 P.2d 427 (1967).

#### **Processing Farm Products.**

Where an employer did not raise any of the commodities processed in its packing and storage facilities and did not establish it was a cooperative organization, it was liable for unemployment insurance contributions on wages of seasonal employees who worked in its packing and storage facilities. *Henggeler Packing Co., Inc. v. Department of Emp.*, 96 Idaho 392, 529 P.2d 1264 (1974).

#### **Question of Type of Service.**

Appellant made no employment contract with the farmer whose crop he was spraying. Such factor may in some instances be proper to consider, but whether labor is done directly for the farmer or by the employee of one engaged in spraying or dusting crops commercially is immaterial, and must be considered

farm or agricultural labor if it is in fact such. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

Agricultural employer was not entitled to utilize the "agricultural labor" exemption under this section because employer's business of assembly and repair of agricultural sprinkler systems did not constitute "cultivating soil" or "raising or harvesting any agricultural or horticultural commodities". *Branchflower v. State*, 128 Idaho 593, 917 P.2d 750 (1996).

Although services rendered by agricultural employer's business fell within the definition of "agricultural labor" under subsection (a)(2) [now (1)(b)] of this section with respect to work done on employer's own farm, and thus qualified for an exemption, the work performed by employer's employees, on other farms, did not meet the "agricultural labor" definition, and with respect to those services employer was a covered employer and em-

ployee was entitled to receive unemployment insurance benefits. *Branchflower v. State*, 128 Idaho 593, 917 P.2d 750 (1996).

### **Spraying.**

The fact that appellant is highly skilled as a pilot does not preclude him from engaging in farm or agricultural labor. A person whose general business or trade is covered by the Employment Security Law has the same right to engage in agricultural labor and while so engaged is subject to the same law as a person who makes agriculture his exclusive occupation or business. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

Spraying or dusting of agricultural crops by whatever means is agricultural labor as that term is defined in the Employment Security Law. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

**Cited in:** *Collins v. Moyle*, 83 Idaho 151, 358 P.2d 1035 (1961).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Brining of cherries.

Dairy farming.

Intent of legislature.

Irrigation operations.

Livestock.

Processing farm products.

Question of type of service.

### **Brining of Cherries.**

Where the stipulation of facts stated that the brining of cherries was incidental to their preparation for the market, this service was not covered by the Unemployment Compensation Act but was agricultural in nature and the employer was exempt from unemployment compensation excise taxes. In re *F. H. Hogue, Inc.*, 67 Idaho 398, 183 P.2d 826 (1947).

### **Dairy Farming.**

It was generally recognized that dairy farming was an agricultural pursuit within the meaning of Unemployment Compensation Law. In re *Farmers Co-op. Creamery Co.*, 66 Idaho 70, 155 P.2d 762 (1945).

Truck drivers performing services for farmers co-operative corporation in collecting milk from members and nonmembers were engaged in an agricultural pursuit within meaning of statute. In re *Farmers Co-op. Creamery Co.*, 66 Idaho 70, 155 P.2d 762 (1945).

### **Intent of Legislature.**

Under the provisions of this act, it was the intent of the legislature to exclude all services of wage earners in agriculture and all farmers, large or small, whether the produce be processed on their own farms or at the pro-

cessing plant of another. In re *Batt*, 66 Idaho 188, 157 P.2d 547 (1945).

### **Irrigation Operations.**

Service performed for mutual nonprofit corporation engaged in operating an irrigation system was agricultural labor. Irrigating the land was as much agricultural labor as was the plowing, grading and cultivating the land after it was cleared of the sagebrush and greasewood. In the arid regions of the west, water was the vitalizing element of agriculture. *Big Wood Canal Co. v. Unemployment Comp. Div.*, 61 Idaho 247, 100 P.2d 49 (1940).

### **Livestock.**

One employed to feed livestock in preparing livestock for market was engaged in "agricultural labor" within the meaning of the provision of the Unemployment Compensation Law that the term "covered employment" should not include agricultural labor, though the labor was not performed on tillable farm land. *Carstens Packing Co. v. Industrial Accident Bd.*, 63 Idaho 613, 123 P.2d 1001 (1942).

In determining whether one employed to assist in fattening livestock for the market was performing "agricultural labor" within the meaning of the provision of the Unemployment Compensation Law that the term



"covered employment" should not include agricultural labor, the nature of the service rendered was controlling, and not the means by which the employer acquired title to the livestock. *Carstens Packing Co. v. Industrial Accident Bd.*, 63 Idaho 613, 123 P.2d 1001 (1942).

Employees of a packing company who fed livestock at the company's feed lots in preparation for market or packing plants were performing "agricultural labor" within the meaning of the provision of the Unemployment Compensation Law that the term "covered employment" should not include agricultural labor, both as to livestock raised on and shipped from the company's ranch, or livestock which was purchased after it had reached the feeder stage of its development. *Carstens Packing Co. v. Industrial Accident Bd.*, 63 Idaho 613, 123 P.2d 1001 (1942).

#### **Processing Farm Products.**

The processing of farm products, consisting in washing, sorting, grading, and packing and crating them so as to make them marketable, but involving no physical or chemical change in substance or structure, constituted "agricultural labor" within the meaning of Unemployment Compensation Law, and hence the employer was not liable for contributions under the law upon wages paid for such work, whether the products processed were purchased by the employer or received on consignment to be processed and sold, a charge for processing and a brokerage charge being deducted from the sale price before paying the balance to the producer. *Batt v. Unemployment Comp. Div.*, 63 Idaho 572, 123 P.2d 1004 (1942).

Where farmer and his employees were engaged in processing produce on his own farm

and that of neighbors, they were engaged in agricultural labor and excluded from the provision of ch. 182, of S.L. 1941. In *re Batt*, 66 Idaho 188, 157 P.2d 547 (1945).

#### **Question of Type of Service.**

One employed to operate a hay mill, mix feed, and assist in feeding lambs, all of which was done in connection with the feeding and fattening for market of lambs purchased by the employer, whose activities included, in addition to the supervision of such work, the management of farm lands cultivated by tenants on a share crop basis, was engaged in "agricultural labor" within the meaning of Unemployment Compensation Law provision excepting from the operation thereof such labor, notwithstanding such work was done on a feed lot apart from the farm land but directly under the ownership and control of the employer and operated solely by him with hired help. *Smythe v. Phoenix*, 63 Idaho 585, 123 P.2d 1010 (1942).

Whether a particular work constituted agricultural labor, expressly excepted by statute from operation of the Unemployment Compensation Law, had to be decided in each case upon the particular facts involved by applying pertinent general rules. *Smythe v. Phoenix*, 63 Idaho 585, 123 P.2d 1010 (1942).

The performance of service by farmers cooperative corporation would not of itself change to nonagricultural employment that which would have been exempt under federal statute. In *re Farmers Co-op. Creamery Co.*, 66 Idaho 70, 155 P.2d 762 (1945).

The question of whether an employer and his employees were engaged in agricultural labor, depended, not on the employer's occupation or business, but on the type of service of the employee. In *re Batt*, 66 Idaho 188, 157 P.2d 547 (1945).

**72-1305. Annual payroll.** — "Annual payroll" means total payroll for a period of twelve (12) consecutive calendar months ending on June 30 of any year. [1947, ch. 269, § 5, p. 793; am. 1949, ch. 144, § 5, p. 252; am. 1951, ch. 236, § 1, p. 482; am. 1998, ch. 1, § 5, p. 3.]

### **JUDICIAL DECISIONS**

#### **Experience Rating.**

Corporation which acquired hotel operated by an individual was not entitled to experience rating of individual even though individual managed the hotel for the corporation

where he owned no stock in the corporation and stockholders had no interest in hotel prior to its acquisition by the corporation. *Moscow Hotel Co. v. Employment Sec. Agency*, 74 Idaho 162, 258 P.2d 1160 (1953).

**72-1306. Base period.** — (1) "Base period" means the first four (4) of the last five (5) completed calendar quarters immediately preceding the beginning of a benefit year.

(2) "Alternate base period" means the first four (4) of the last five (5) completed calendar quarters immediately prior to the Sunday of the week in

which a medically verifiable temporary total disability occurred. To use the alternate base period, a claimant must file within three (3) years of the beginning of the temporary total disability, and no longer than six (6) months after the end of the temporary total disability. [1947, ch. 269, § 6, p. 793; am. 1949, ch. 144, § 6, p. 252; am. 1967, ch. 117, § 1, p. 233; am. 1993, ch. 181, § 1, p. 461; am. 1998, ch. 1, § 6, p. 3.]

**72-1307. Benefits.** — “Benefits” means the money paid to an individual with respect to his unemployment. [1947, ch. 269, § 6, p. 793; am. 1949, ch. 144, § 6, p. 252; am. 1967, ch. 117, § 1, p. 233; am. 1976, ch. 207, § 1, p. 754; am. 1998, ch. 1, § 7, p. 3.]

**72-1308. Benefit year.** — “Benefit year” means a period of fifty-two (52) consecutive weeks beginning with the first day of the week in which an individual files a new valid claim for benefits; except that the benefit year shall be fifty-three (53) weeks if the filing of a new valid claim would result in overlapping any quarter of the base year of a previously filed new claim. A subsequent benefit year cannot be established until the expiration of the current benefit year. [1947, ch. 269, § 8, p. 793; am. 1949, ch. 144, § 8, p. 252; am. 1967, ch. 117, § 2, p. 233; am. 1998, ch. 1, § 8, p. 3.]

**72-1309. Commission.** — “Commission” means the industrial commission. [1947, ch. 269, § 9, p. 793; am. 1949, ch. 144, § 9, p. 252; am. 1998, ch. 1, § 9, p. 3.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words “industrial commission” and “commission” were substituted for “industrial accident board” and “board” on the authority of S.L. 1971, ch. 124, § 3, p. 422 compiled herein as § 72-502,

which provided that the references to the “industrial accident board” and “board” were deemed to be references to the “industrial commission.”

**72-1310. Bonus payment.** — “Bonus payment” means wages paid for employment by an employer which are either:

(1) Additional remuneration for meritorious service and not customarily paid to his employees at regular payroll intervals; or

(2) Additional remuneration based upon production, length of service, or profits, which at the time paid covers service rendered in two (2) or more calendar quarters. Bonus payments shall be reported by employers as prescribed by rule. [1947, ch. 269, § 10, p. 793; am. 1949, ch. 144, § 10, p. 252; am. 1951, ch. 104, § 1, p. 233; am. 1998, ch. 1, § 10, p. 3.]

**72-1311. Calendar quarter.** — “Calendar quarter” means the period of three (3) consecutive calendar months ending on March 31, June 30, September 30, and December 31, in each year. [1947, ch. 269, § 11, p. 793; am. 1949, ch. 144, § 11, p. 252; am. 1951, ch. 104, § 2, p. 233; am. 1998, ch. 1, § 11, p. 3.]



**72-1312. Compensable week.** — “Compensable week” means a week of unemployment, all of which occurred within the benefit year, for which an eligible claimant is entitled to benefits and during which:

- (1) The claimant had either no work or less than full-time work; and
- (2) No benefits have been paid to the claimant; and
- (3) The claimant complied with all of the personal eligibility conditions of section 72-1366, Idaho Code; and
- (4) The total wages payable to the claimant for less than full-time work performed in such week amounted to less than one and one-half (1 ½) times his weekly benefit amount; provided, however, that any benefits which a claimant receives for any week shall be reduced by an amount equal to the amount received as pension, retirement pay, annuity, or any other similar payment which is based on the previous work of such individual which is reasonably attributable to such week, if the payment is made under a plan maintained or contributed to by the base period employer and the claimant has made no contributions to the plan; and
- (5) All of which occurred after a waiting week as defined in section 72-1329, Idaho Code. [1947, ch. 269, § 12, p. 793; am. 1949, ch. 144, § 12, p. 252; am. 1961, ch. 298, § 1, p. 539; am. 1967, ch. 117, § 3, p. 233; am. 1980, ch. 256, § 1, p. 667; am. 1990, ch. 353, § 1, p. 946; am. 1998, ch. 1, § 12, p. 3.]

## JUDICIAL DECISIONS

### ANALYSIS

Basis for award.  
Denial of benefits.  
Increment received while unemployed.  
Number of hours worked during week.  
Person attending regular, established school.  
Person attending school.  
Retirement payments.

#### **Basis for Award.**

Where the record showed that claimant worked 41 hours one week, regardless of the fact that he was compensated for only seven of those hours, the time worked for his employer rendered claimant ineligible for benefits because it was not a week “of either no work or less than full-time work,” within the meaning of this section; thus, the Industrial Commission’s determination that the benefits received by claimant for that week must be refunded to the department was correct. *Smith v. State, Dep’t of Emp.*, 107 Idaho 625, 691 P.2d 1240 (1984).

#### **Denial of Benefits.**

Unemployment compensation claimant was ineligible for benefits because she was not “unemployed” as defined by this section and § 72-1366, for nothing indicated that her health, safety, morals, or physical fitness would be at risk, that she would be forced to commute an unreasonable distance, or that her potential earnings as a real estate profes-

sional would be significantly different than her former salary as office manager, and, additionally, her desires to limit her search to only 8-5 office positions and not work full-time as a real estate professional amounted to self-imposed conditions barring her from unemployment compensation. *Scrivner v. Service IDA Corp.*, 126 Idaho 954, 895 P.2d 555 (1995).

#### **Increment Received While Unemployed.**

Claimant, a carpenter, upon termination of his employment by reason of the completion of the project, filed claim for unemployment benefits and was thereafter paid benefits. Excluding a short reemployment interval and vacation period, the unemployed carpenter commenced constructing a dwelling on two lots he owned, during his spare time while unemployed and such was held to be an increment of his estate equal to, if not greater than, the wages he would have been required to pay other artisans to work for him and he was held fully employed and receiving actual

wages, and therefore not entitled to compensation benefits, but since he had received them in good faith was not required to repay benefits received. *Hatch v. Employment Sec. Agency*, 79 Idaho 246, 313 P.2d 1067 (1957).

#### **Number of Hours Worked During Week.**

The number of hours during the week which a claimant is working, even though the work may be voluntary and no compensation received, may nevertheless be material to the question of whether he is "available for suitable work, and seeking work" as required for eligibility under § 72-1366(d) (now 72-1366(4)). Hence, the number of hours worked during the week for his employer, whether they be gratuitous or for pay, is a material fact and must be reported by the claimant. *Smith v. State, Dep't of Emp.*, 107 Idaho 625, 691 P.2d 1240 (1984).

#### **Person Attending Regular, Established School.**

It was permissible for this section to exclude daytime but not nighttime students from eligibility for unemployment benefits, since the legislature could rationally conclude that daytime work is far more plentiful than nighttime work and that consequently daytime students restrict the range of jobs open to them; and the fact that the classification is imperfect because some daytime students actually find job opportunities more numerous at night does not invalidate the statute under U.S. Const., amend. XIV. *Idaho Dep't of Emp. v. Smith*, 434 U.S. 100, 98 S. Ct. 327, 54 L. Ed. 2d 324 (1977).

A person who attends classes during the day will qualify for unemployment compensation under the employment security law (I.C. § 72-1301 et seq.) by demonstrating that he is primarily a member of the work force because

of the amount of time, and not the time of the day, spent at work. *Kerr v. Department of Emp.*, 97 Idaho 385, 545 P.2d 473 (1976).

This section did not preclude claimant from receipt of unemployment compensation benefits because of her attendance at early morning classes at Boise State University. *Smith v. Department of Emp.*, 100 Idaho 520, 602 P.2d 18 (1979).

The language of subsection (a) [now (1)] of this section permits receipt of benefits by an otherwise eligible claimant whose enrollment in school does not affect the claimant's availability for suitable full-time employment. *Smith v. Department of Emp.*, 100 Idaho 520, 602 P.2d 18 (1979).

#### **Person Attending School.**

The general rule appears to be that student-claimants who are held eligible for unemployment benefits are those who place availability for work ahead of their schooling and demonstrate a willingness to change class schedules or drop out of school if a job conflict makes such necessary. The demonstrated inquiry is whether the claimant is genuinely attached to the labor market or principally interested in obtaining an education. *Davenport v. State, Dep't of Emp.*, 103 Idaho 492, 650 P.2d 634 (1982).

#### **Retirement Payments.**

Retirement payments under the U.S. Air Force Retirement Program are considered as wages under the code. *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965).

**Cited in:** *Corwin v. Sunshine Min. Co.*, 96 Idaho 211, 525 P.2d 993 (1974); *Howard v. Department of Emp.*, 100 Idaho 314, 597 P.2d 37 (1979); *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001).

**72-1313. Computation date.** — "Computation date" means the June 30 immediately prior to the calendar year for which a covered employer's taxable wage rate is effective. [1947, ch. 269, § 13, p. 793; am. 1949, ch. 144, § 13, p. 252; am. 1951, ch. 236, § 2, p. 482; am. 1963, ch. 314, § 1, p. 841; am. 1965, ch. 170, § 1, p. 331; am. 1967, ch. 117, § 4, p. 233; am. 1991, ch. 119, § 1, p. 248; am. 1998, ch. 1, § 13, p. 3.]

**72-1314. Contributions.** — "Contributions" means the payments required to be paid into the employment security fund by any covered employer pursuant to sections 72-1349 through 72-1353, Idaho Code. [1947, ch. 269, § 14, p. 793; am. 1949, ch. 144, § 14, p. 252; am. 1976, ch. 207, § 2, p. 754; am. 1980, ch. 264, § 1, p. 682; am. 1998, ch. 1, § 14, p. 3.]

### **JUDICIAL DECISIONS**

**Cited in:** *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).



## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Exemption from tax.

Liability for tax.

State an interested party.

Statute of limitations.

**Exemption from Tax.**

Where a contract gave an employer control or the right of control of its representatives, no provision of such contract would exempt the employer from liability for unemployment excise tax payments. *Continental Oil Co. v. Unemployment Comp. Div.*, 68 Idaho 194, 192 P.2d 599 (1947).

**Liability for Tax.**

Liability for unemployment excise tax could not be avoided by an employer by reason of remuneration in the form of "commissions" instead of "wages." *Continental Oil Co. v. Unemployment Comp. Div.*, 68 Idaho 194, 192 P.2d 599 (1947).

**State an Interested Party.**

The state had a personal interest in seeing that the fund was collected and properly disbursed. *State ex rel. Taylor v. Robinson*, 59 Idaho 485, 83 P.2d 983 (1938).

**Statute of Limitations.**

Taxes and penalties arising out of Unemployment Compensation Law constituted a "statutory liability" and fell within the three-year statute of limitations. *State v. Ada County Dairymen's Ass'n*, 66 Idaho 317, 159 P.2d 219 (1945).

**72-1315. Covered employer. — "Covered employer" means:**

(1) Any person who, in any calendar quarter in either the current or preceding calendar year paid for services in covered employment wages of one thousand five hundred dollars (\$1,500) or more, or for some portion of a day in each of twenty (20) different calendar weeks, whether or not consecutive, in either the current or preceding calendar year employed at least one (1) individual (irrespective of whether the same individual was in employment in each such day). For purposes of this subsection there shall not be taken into account any wages paid to, or in employment of, an employee performing domestic services referred to in subsection (8) of this section.

(2) All individuals performing services within this state for an employer who maintains two (2) or more separate establishments within this state shall be deemed to be performing services for a single employer.

(3) Each individual engaged to perform or assist in performing the work of any person in the service of an employer shall be deemed to be employed by such employer for all the purposes of this chapter, whether such individual was engaged or paid directly by such employer or by such person, provided the employer had actual or constructive knowledge of the work.

(4) Any employer (whether or not an employer at the time of acquisition) who acquires the organization, trade, or business or substantially all the assets thereof, of another who at the time of such acquisition was a covered employer.

(5) In the case of agricultural labor, any person who:

(a) During any calendar quarter in the calendar year or the preceding calendar year paid wages in cash of twenty thousand dollars (\$20,000) or more for agricultural labor; or

(b) On each of some twenty (20) days during the calendar year or during the preceding calendar year, each day being in a different calendar week,

employed at least ten (10) individuals in employment in agricultural labor for some portion of the day.

(c) Such labor is not agricultural labor when it is performed by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the immigration and nationality act, unless the individual is required to be covered by the federal unemployment tax act.

(6) A crew leader who furnishes members of a crew to perform agricultural labor for another person if:

(a) The crew leader holds a valid certificate of registration under the migrant and seasonal agricultural worker protection act; or

(b) Substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by the crew leader; and

(c) The crew leader is not an employee of such other person.

(7) In the case of any individual who is furnished by a crew leader to perform agricultural labor for another person, such other person and not the crew leader shall be treated as the employer of the individual if the crew leader is not, under the provisions of subsection (6) of this section, considered to be the employer and such other person shall be treated as having paid cash remuneration to the individual in an amount equal to the amount of cash remuneration paid to the individual by the crew leader (either on his behalf or on behalf of such other person) for the agricultural labor performed for such other person.

(8) In the case of domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, any person who during any calendar quarter in the calendar year or the preceding calendar year paid wages in cash of one thousand dollars (\$1,000) or more for such service.

A person treated as a covered employer under this subsection (8) shall not be treated as a covered employer with respect to wages paid for any service other than domestic service referred to in this subsection (8) unless such person is treated as a covered employer under subsection (1) or (5) of this section, with respect to such other service.

(9) Any governmental entity as defined in section 72-1322C, Idaho Code.

(10) A nonprofit organization as defined in section 72-1322D, Idaho Code.

(11) An employer who has elected coverage pursuant to the provisions of subsection (3) of section 72-1352, Idaho Code. [1947, ch. 269, § 15, p. 793; am. 1949, ch. 144, § 15, p. 252; am. 1955, ch. 18, § 1, p. 20; am. 1967, ch. 117, § 5, p. 233; am. 1971, ch. 142, § 2, p. 595; am. 1977, ch. 179, § 1, p. 464; am. 1980, ch. 52, § 1, p. 107; am. 1983, ch. 146, § 1, p. 382; am. 1989, ch. 57, § 1, p. 78; am. 1996, ch. 62, § 1, p. 180; am. 1998, ch. 1, § 15, p. 3.]

#### STATUTORY NOTES

**Cross References.** — Crew leader, § 72-1320.

**Federal References.** — Sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act referred to in subsection (e)(3)

of this section are compiled in 8 U.S.C., §§ 1184(c) and 1101(a)(15)(H).

The federal unemployment tax act referred to in subsection (5)(c) of this section is compiled as 26 U.S.C. §§ 3301-3311.



**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1980, ch. 52 read: "An emergency existing therefor,

which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval and retroactively to January 1, 1980."

## JUDICIAL DECISIONS

### ANALYSIS

Evidence.

In general.

Question of type of service.

Standing to challenge inclusion.

### Evidence.

Evidence that employer paid over \$300 to claimant for claimant's services supported finding of Industrial Commission that employer was a covered employer under this section and therefore required her to pay claimant unemployment compensation. *Hill v. State, Dep't of Emp.*, 108 Idaho 583, 701 P.2d 203 (1985).

### In General.

Despite an employer's contention that the imposition of the unemployment compensation tax upon him was arbitrary since neither he nor his employees received any benefit therefrom, indirect benefits were received from increasing the stability of the employer-employee climate throughout the state, as well as a reduced strain on the welfare system. But even assuming his assertion to be correct, employers are rated as to the number of their employees who receive fewest unemployment benefits and, therefore, there is an attempt at least to require employers who are most responsible for involuntary unemployment to bear a higher burden of the cost. *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).

### Question of Type of Service.

Agricultural employer was not entitled to utilize the "agricultural labor" exemption under § 72-1304 because employer's business of assembly and repair of agricultural sprinkler systems did not constitute "cultivating soil" or "raising or harvesting any agricultural or horticultural commodities". *Branchflower v.*

*State*, 128 Idaho 593, 917 P.2d 750 (1996).

Although services rendered by agricultural employer's business fell within the definition of "agricultural labor" under § 72-1304(a)(2) (now 72-1304(1)(b)) with respect to work done on employer's own farm, and thus qualified for an exemption, the work performed by employer's employees, on other farms, did not meet the "agricultural labor" definition, and with respect to those services employer was a covered employer and employee was entitled to receive unemployment insurance benefits. *Branchflower v. State*, 128 Idaho 593, 917 P.2d 750 (1996).

### Standing to Challenge Inclusion.

Where in an action by an employer to have his business exempted from unemployment compensation taxes, there was no evidence indicating that the employees do or would seek to have their employer's business exempted from unemployment compensation taxes and the employees were not parties to the action, the employer had no standing to argue that requiring him as a "covered employer" to pay such taxes violated the constitutional equal protection rights of his employees. *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).

**Cited in:** *Appeal of MacKenzie Auto. Equip. Co.*, 71 Idaho 362, 232 P.2d 130 (1951); *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963); *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975); *Department of Emp. v. Drinkard*, 98 Idaho 222, 560 P.2d 1312 (1977).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

District court's jurisdiction.

Independent contractor.

Insurance agent.

Nonprofit association.

Processor of fruits.

**District Court's Jurisdiction.**

The district court had the authority to determine whether an employer was a covered employer, the number of employees on which taxes had to be paid and kindred matters. *State v. Ada County Dairymen's Ass'n*, 66 Idaho 317, 159 P.2d 219 (1945).

**Independent Contractor.**

Where the evidence showed without contradiction that motor carriers who carried newspapers for a publishing company to surround towns were actually and customarily engaged in an independently established profession, trade, or business within the meaning of the provision of the Unemployment Compensation Law excepting employment where service was performed by one so engaged, the industrial accident board could not arbitrarily find to the contrary and compel the company to pay contributions on earnings of such carriers. *Idaho Times Pub. Co. v. Industrial Accident Bd.*, 63 Idaho 720, 126 P.2d 573 (1942).

Where contractors agreed to excavate drifts in mine for stated sum per foot, to furnish all labor and material, to carry compensation insurance for themselves and employees and to pay social security and old age pensions, they were independent contractors and not employees of mining company, even though the latter had direct control over the direction of the mines, and the mining company was not liable for employment compensation tax. *In re General Electric Co.*, 66 Idaho 91, 156 P.2d 190 (1945).

**Insurance Agent.**

The district court did not have jurisdiction to determine whether an insurance company and its agents came within act, since its jurisdiction was confined to the determination of questions involving constitutionality. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

**Nonprofit Association.**

Services performed for a mutual nonprofit association engaged in irrigation were within the provisions of the Unemployment Compensation Law excepting from "covered employment" services performed in the employ of an "individual owner or tenant operating a farm in connection with cultivation of soil, the production and harvesting of crops," since to construe the provision as confining the exception to a single individual owner or tenant would render it unconstitutional as highly discriminatory, arbitrary, and unreasonable. *Big Wood Canal Co. v. Unemployment Comp. Div.*, 63 Idaho 785, 126 P.2d 15 (1942).

**Processor of Fruits.**

Where the stipulation of facts disclosed a market in the state for dried apples for dehydrating purposes and all apples purchased were so processed and marketed, the processor was not exempt from unemployment compensation excise taxes. *In re F. H. Hogue, Inc.*, 67 Idaho 398, 183 P.2d 826 (1947).

**72-1315A. Cost reimbursement employer.** — "Cost reimbursement employer" means a covered employer who is eligible and elects to reimburse the fund for proportionate benefit costs in lieu of contributions as provided in sections 72-1349A and 72-1349B, Idaho Code. [I.C., § 72-1315A, as added by 1971, ch. 142, § 3, p. 595; am. 1975, ch. 126, § 1, p. 259; am. 1980, ch. 264, § 2, p. 682; am. 1998, ch. 1, § 16, p. 3.]

**72-1316. Covered employment.** — (1) "Covered employment" means an individual's entire service performed by him for wages or under any contract of hire, written or oral, express or implied.

(2) Notwithstanding any other provision of state law, services shall be deemed to be in covered employment if a tax is required to be paid or was required to be paid the previous year on such services under the federal unemployment tax act or if the director determines that as a condition for full tax credit against the tax imposed by the federal unemployment tax act such services are required to be covered under this chapter.

(3) Services covered by an election pursuant to section 72-1352, Idaho Code, and services covered by an election approved by the director pursuant to section 72-1344, Idaho Code, shall be deemed to be covered employment during the effective period of such election.



(4) Services performed by an individual for remuneration shall, for the purposes of the employment security law, be covered employment unless it is shown:

(a) That the worker has been and will continue to be free from control or direction in the performance of his work, both under his contract of service and in fact; and

(b) That the worker is engaged in an independently established trade, occupation, profession, or business.

(5) "Covered employment" shall include an individual's entire service, performed within or both within and without this state:

(a) If the service is localized in this state; or

(b) If the service is not localized in any state but some of the service is performed in this state, and:

(i) The individual's base of operations or the place from which such service is directed or controlled is in this state; or

(ii) The individual's base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(c) Service shall be deemed to be localized within a state if:

(i) The service is performed entirely within such state; or

(ii) The service is performed both within and without such state, but the service performed without such state is incidental, temporary or transitory in nature or consists of isolated transactions, as compared to the individual's service within the state.

(d) "Covered employment" shall include an individual's service, wherever performed within the United States, or Canada, if:

(i) Such service is not covered under the unemployment compensation law of any other state, the Virgin Islands, or Canada; and

(ii) The place from which the service is directed or controlled is in this state.

(6) "Covered employment" shall include the services of an individual who is a citizen of the United States, performed outside the United States, (except in Canada) in the employ of an American employer (other than service which is deemed "covered employment" under the provisions of subsection (5) of this section or the parallel provisions of another state's law), if:

(a) The employer's principal place of business in the United States is located in this state; or

(b) The employer has no place of business in the United States; but

(i) Is an individual who is a resident of this state; or

(ii) Is a corporation which is organized under the laws of this state; or

(iii) Is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any other state; or

(c) None of the criteria of provision (a) or (b) of this subsection is met but the employer has elected coverage in this state, or the employer having failed to elect coverage in any state, the individual has filed a claim for benefits based on such service, under the law of this state;

(d) An "American employer" for purposes of this subparagraph means a person who is:

- (i) An individual who is a resident of the United States; or
- (ii) A partnership if two-thirds ( $\frac{2}{3}$ ) or more of the partners are residents of the United States; or
- (iii) A trust if all of the trustees are residents of the United States; or
- (iv) A corporation organized under the laws of the United States or of any state.

(e) For purposes of this subsection, "United States" means the states, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. [1947, ch. 269, § 16, p. 793; am. 1949, ch. 144, § 16, p. 252; am. 1949, ch. 204, § 1, p. 425; am. 1951, ch. 235, § 2, p. 472; am. 1957, ch. 193, § 1, p. 382; am. 1959, ch. 252, § 1, p. 537; am. 1963, ch. 316, § 2, p. 864; am. 1963, ch. 318, § 1, p. 872; am. 1965, ch. 214, § 1, p. 490; am. 1970, ch. 13, § 1, p. 23; am. 1971, ch. 142, § 4, p. 595; am. 1974, ch. 51, § 1, p. 1106; am. 1976, ch. 224, § 1, p. 797; am. 1977, ch. 179, § 2, p. 464; am. 1978, ch. 112, § 2, p. 232; am. 1991, ch. 67, § 1, p. 162; am. 1993, ch. 119, § 1, p. 297; am. 1998, ch. 1, § 17, p. 3; am. 2004, ch. 24, § 1, p. 32.]

#### STATUTORY NOTES

**Cross References.** — Election of employer coverage, § 72-1352.

Reciprocal arrangements and cooperation, § 72-1344.

**Federal References.** — The federal unemployment tax act, referred to in subsection (2) of this section, is compiled in 26 U.S.C.S. §§ 3301—3309.

**Compiler's Notes.** — The words enclosed

in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1970, ch. 13 declared an emergency. Approved February 10, 1970.

Section 2 of S.L. 1974, ch. 51 provided this act take effect on and after July 1, 1974.

Section 2 of S.L. 1991, ch. 67 declared an emergency. Approved March 21, 1991.

#### JUDICIAL DECISIONS

##### ANALYSIS

Agricultural labor.

Appeals.

Barbers.

Base of operations.

Constitutionality.

Construction.

Covered employees.

Covered employer.

Employer-employee.

Exempt organizations.

Exemptions.

Fact question.

Hearing.

— Notice.

Incidental to service within state.

Independent contractor.

Insurance company.

Intent of legislature.

Logging superintendent.

Mobile home court lessee.

Payment of federal tax.

Purpose of act.

Right of control.



Right of discharge not test of employment relationship.

School districts.

Service station.

Teachers.

Termination.

Test.

Transporting mobile homes.

### **Agricultural Labor.**

The cleaning and processing of edible beans and peas is agricultural labor and is exempt from employment security payroll tax as "agricultural labor" even though the company purchases some of the peas and beans, where the company imposed a charge on the farmer for processing and cleaning whether beans and peas were held for redelivery or purchase. *Chester B. Brown Co. v. Employment Sec. Agency*, 78 Idaho 166, 299 P.2d 487 (1956).

Appellant made no employment contract with the farmer whose crop he was spraying. Such factor may in some instances be proper to consider, but whether labor is done directly for the farmer or by the employee of one engaged in spraying or dusting crops commercially is immaterial, and must be considered farm or agricultural labor if it is in fact such. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

Spraying or dusting of agricultural crops by whatever means is agricultural labor as that term is defined in the Employment Security Law. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

The fact that appellant is highly skilled as a pilot does not preclude him from engaging in farm or agricultural labor. A person whose general business or trade is covered by the Employment Security Law has the same right to engage in agricultural labor and while so engaged is subject to the same law as a person who makes agriculture his exclusive occupation or business. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

Although a family-owned corporation engaged in the slaughter, processing, and packaging of chickens for market obtained most of its chickens from a hatching corporation owned by the same family, such corporation was not engaged in agriculture as defined by § 72-1304(a)(4) (now 72-1304(1)(d)). *Lowe v. Bertie's Poultry Farms, Inc.*, 91 Idaho 695, 429 P.2d 427 (1967).

Where it is evident that the primary purpose of employer's poultry business is to produce, hatch, raise and sell poultry, and the various components of the corporation constitute a single integrated farming venture, and that the processing plant is incidental to the total farming enterprise, an employee of the processing plant cannot qualify under the employment security act. *Etchehoury v. Avi-Simplot, Inc.*, 93 Idaho 438, 462 P.2d 737 (1969).

### **Appeals.**

Court on appeal is bound by findings of board if supported by substantial evidence. *Blue Bell Co. v. Employment Sec. Agency*, 75 Idaho 279, 270 P.2d 1054 (1954).

On appeal of a department of commerce and labor finding that an employer was liable for unpaid unemployment insurance taxes, the industrial commission's § 72-1316(4)(a) "control" test conclusion was unsupported where the evidence attributed by the commission as showing the company's direction and control related to the company's interest in the quality of end product rather than the methods by which that outcome was achieved and setting compensation was unrelated to the control of the work process itself. Similarly, the company's practice of dictating who paid for insurance was part of the relationship between the company and its workers, but shed no light on which party controlled how actual work was performed. *Excell Constr. v. State*, 141 Idaho 688, 116 P.3d 18 (2005).

### **Barbers.**

Right of control over the acts of barbers which have influence on the public health creates the relationship of employer-employee between the owner or operator of a barber shop and barbers leasing chairs in the shop so that the owner or operator must pay employment security tax. *Byrd v. Employment Sec. Agency*, 86 Idaho 469, 388 P.2d 100 (1964).

### **Base of Operations.**

The term "residence" is not a synonym for "base of operations" under this section. *Heller v. International Transport, Inc.*, 94 Idaho 91, 481 P.2d 602 (1971).

### **Constitutionality.**

There is nothing in the Employment Security Law which is so arbitrary, unfounded or unreasonable as to violate any provision of the constitution. *Florek v. Sparks Flying Serv., Inc.*, 83 Idaho 160, 359 P.2d 511 (1961).

The particular provisions of this section which single out those who contract with agents for the distribution of meat products, vegetable products, fruit products, bakery products, beverages or laundry or dry cleaning services, and denominates them as employers who are required to pay unemployment compensation tax are unconstitutional on their face and as applied, since equal protection of the laws is denied, in violation of the Fourteenth Amendment of the United

States Constitution and Art. 1, § 2 of the Idaho Constitution. *Bon Appetit Gourmet Foods, Inc. v. State, Dep't of Emp.*, 117 Idaho 1002, 793 P.2d 675 (1989).

### **Construction.**

In view of the dissimilar purposes of the Income Tax Law — that of raising of money, and the Unemployment Compensation Law — ameliorating the hardships of exculpatory unemployment, it is absolutely inappropriate to use the same interpretation of similar language in each act relating to exemption of religious and educational organizations. In re *Gem State Academy Bakery*, 70 Idaho 488, 224 P.2d 529 (1950).

### **Covered Employees.**

Where franchisee, who owned franchise rights to operate income tax preparation offices, contracted with persons for the management and operation of such offices whereby franchisee retained power to promulgate policies and procedures for the conduct of the business and to control managers in the performance of their work, franchisee was an employer and the managers were not engaged in an independently established business. *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975).

Industrial Commission's finding that the claimant was not engaged in an independent trade or business was supported by evidence that claimant did not have the right to hire assistants but instead, when she found it necessary to be away from work, sought employer's approval, that claimant would then trade shifts with another worker or employer would find a substitute for her, that claimant did not own or furnish any of the major items of equipment, that neither employer or claimant was contractually liable to the other for a peremptory termination of the business relationship, that claimant did not advertise her services or collect any fees from the parents for the services she performed but was paid on a regular monthly basis, and that employer could terminate her employment at will. *Hill v. State, Dep't of Emp.*, 108 Idaho 583, 701 P.2d 203 (1985).

Evidence that claimant performed whatever duties that employer wanted done, that she received supervision from employer almost daily, that she received verbal instructions from employer as to what she was to do, what time to take breaks, what time to come in, that employer set the hours for the school as well as those for the claimant, that employer posted a schedule as to who was going to work and what hours, that employer had the right to direct the claimant's day-to-day activities, and that the claimant obtained the employer's approval in order to take time off, supported the Industrial Commission's determination that claimant was not free from

control or direction in the performance of her work in determining that claimant was a covered employee. *Hill v. State, Dep't of Emp.*, 108 Idaho 583, 701 P.2d 203 (1985).

As defined, "covered employment" sweeps within its purview employee and independent contractor alike; it is only through later provisions of this section that an independent contractor may "exempt out" of the purview of this term. *Software Assocs. v. State, Dep't of Emp.*, 110 Idaho 315, 715 P.2d 985 (1986).

The general test of whether the right to control is sufficient to give rise to the relationship of employer and employee is whether the control extends to the details of the work, the manner, method or mode of doing it, the means by which it is to be accomplished, or, specifically, the details, manner, means or method of doing the work, as contrasted with the result thereof. *J.R. Simplot Co. v. State, Dep't of Emp.*, 110 Idaho 762, 718 P.2d 1200 (1986).

The term "covered employment" as used in the Employment Security Act is an expansive term. *King v. State, Dep't of Emp.*, 110 Idaho 312, 715 P.2d 982 (1986).

For an employer to prove that a worker's services are exempt from the broad definition of "covered employment," the employer must show that the worker is not an employee, but is an independent contractor who has been and will continue to be free from control or direction in the performance of his work, both under his contract of service and in fact, and is engaged in an independently established trade, occupation, profession or business. *King v. State, Dep't of Emp.*, 110 Idaho 312, 715 P.2d 982 (1986).

Where the employer hired employees to assist him in a truck washing business, no worker was required to furnish any equipment for the job other than personal clothing, the employer showed the worker how to perform the washing work and how to complete paperwork, no liability existed between the workers and the employer for terminating the relationship without notice, the employer allowed the workers to set when they would quit working and allowed them to have others substitute for them, workers were paid for each truck washed regardless of the amount of time spent washing the vehicle, and received 30 percent of the gross amount billed to the truck driver, the services of the workers were "covered employment," since they were subject to the employer's direction and control and were not engaged in an independent business, their payment constituted wages for unemployment insurance purposes, and the employer was a covered employer. *Burns Bros. v. Holtzman*, 115 Idaho 62, 764 P.2d 429 (1988).

Plaintiff appealed the decision of the Industrial Commission of the State of Idaho affirm-



ing a determination that services performed by plaintiff's sales representatives came within the scope of employment covered by unemployment compensation and that commissions paid by plaintiff to its sales representatives were wages for employment security fund contribution purposes. The Industrial Commission's findings were not supported by substantial and competent evidence. Thus, the order of the Industrial Commission was vacated and remanded. *Vendx Mktg. Co. v. Department of Emp.*, 122 Idaho 890, 841 P.2d 420 (1992).

Drivers and mechanics at used car lot were employees subject to coverage under this act. *Beale v. State, Dep't of Emp.*, 131 Idaho 37, 951 P.2d 1264 (1997).

### **Covered Employer.**

Employer was a covered employer for purposes of unemployment insurance where employer had authority to hire and fire employee, where there was no liability for employee's termination in excess of compensation for his services, where employer owned major items of equipment, where employer determined the direction and control of employee's duties, and where employer and employee intended to have a long-term employer-employee relationship. *DesFosses v. State, Dep't of Emp.*, 123 Idaho 746, 852 P.2d 498 (1993).

### **Employer-Employee.**

Several factors may be considered in determining whether an employer-employee relationship exists. Among such factors are (1) the way the corporation represented its relationship to the worker prior to the present litigation, including its representations of the IRS; (2) statements made to the Department of Employment; (3) method of payment, in particular whether federal, state and FICA taxes are withheld from paychecks; and (4) whether certain benefits (life or health insurance) are provided the worker at the corporation's expense. *Software Assocs. v. State, Dep't of Emp.*, 110 Idaho 315, 715 P.2d 985 (1986).

The two part test of subdivision (d)(1) of this section is not even reached if, under all the facts and circumstances, the factfinder determines that the work relationship is one of employer-employee. *Software Assocs. v. State, Dep't of Emp.*, 110 Idaho 315, 715 P.2d 985 (1986).

There was substantial and competent evidence on record to support the Industrial Commission's decision that a worker hired to irrigate lawns at a housing project operated by the housing authority was an employee rather than an independent contractor; the housing authority exercised the right to control the time, manner and method of the work, the worker was required to work specific hours and never hired anyone to do the

work for him, the worker did not provide equipment except for one shovel and protective clothing, and the worker did not advertise as an irrigator or work for any other business as an irrigator, or in any other capacity. *Housing Auth. v. State, Dep't of Emp.*, 119 Idaho 639, 809 P.2d 500 (1991).

### **Exempt Organizations.**

Where a commercial activity is carried out by a concededly exempt organization, it may not, by reason of its over-all characteristics, be exempt from unemployment compensation taxes. In re *Gem State Academy Bakery*, 70 Idaho 488, 224 P.2d 529 (1950).

Activities carried on clearly within the religious, scientific, literary, and educational fields are exempt from taxation under this act, however activities carried on by such organizations, if of a commercial nature, require that the employees in such activities be given the protection of the Unemployment Compensation Law. In re *Gem State Academy Bakery*, 70 Idaho 488, 224 P.2d 529 (1950).

### **Exemptions.**

Services performed by the Ada County Fair Board were performed in the employ of Ada County and were exempt from the Employment Security Act under former subsection (a)(6) of this section. *Department of Emp. v. Ada County Fair Bd.*, 96 Idaho 591, 532 P.2d 933 (1974).

For an employer to establish that unemployment insurance contributions are not required of him under subsection (d) [now (4)] of this section, the employer must demonstrate that workers are not only free from present control and direction by the employer but also that the workers are free from the right to control by the employer. *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975).

Where "contract laborers" of the Idaho bicentennial commission who were hired to do specialty tasks in a restoration project were not closely supervised, worked their own hours and brought their own hand tools to work, they were independent contractors and therefore the commission was not liable for unemployment insurance contributions. *Department of Emp. v. Idaho Bicentennial Comm'n*, 98 Idaho 153, 559 P.2d 769 (1977).

Prior to the effective date of the 1974 amendment which added a specific exemption concerning real estate salesmen (dropped by 1977 amendment), the services provided by commissioned real estate salesmen for real estate brokers were exempted from the definition of "covered employment," since under the state real estate law, § 54-2021 et seq., real estate brokers and real estate salesmen are engaged in separate professions. *Department of Emp. v. Bake Young Realty*, 98 Idaho 182, 560 P.2d 504 (1977).

Where real estate salesmen were free to make their own hours and develop their own techniques of salesmanship, were paid only by commission regardless of the amount of time they worked and no deductions were withheld from the commissions, where they were free to negotiate deals with other brokers and salesmen and where they frequently possessed substantial real estate, they were engaged in an "independently established trade, occupation, profession or business" under subsection (d)(1)(B) [now (4)(b)] of this section and their services were not "covered employment." *Department of Emp. v. Bake Young Realty*, 98 Idaho 182, 560 P.2d 504 (1977).

It was reasonable for the legislature to exempt agricultural employers, but not exempt seasonal lawn sprinkler installation employers from the payment of unemployment compensation taxes, since the legislature may reasonably have determined that agricultural employment is inherently more unstable than nonagricultural employment and hence directed its efforts toward the nonagricultural market as being more likely to succeed while opting to deal with the agricultural labor market at a later time. *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982).

Even if an organization meets the requirements of § 72-1316A(g)(1) (now (7)(a)), governing religious organizations, so as to qualify for an exemption from paying state unemployment insurance taxes, it is not exempt under the Idaho Employment Security Law if it is required to pay the taxes imposed by the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 — 3309. *State, Dep't of Emp. v. Idaho Allied Christian Forces*, 105 Idaho 312, 669 P.2d 201 (1983).

If a putative employer does not dispute that a claimant received remuneration for services performed, then for purposes of this section there is covered employment subject to the putative employer showing that an exemption applies. *Beale v. State, Dep't of Emp.*, 131 Idaho 37, 951 P.2d 1264 (1997).

### **Fact Question.**

It is for the Industrial Commission as fact finder to determine whether the worker is covered by this section or is excluded. *Burns Bros. v. Holtzman*, 115 Idaho 62, 764 P.2d 429 (1988).

### **Hearing.**

#### **—Notice.**

In an action for unemployment benefits, the refusal of the Industrial Commission to conduct a hearing violated due process, where the appeals examiner concluded that it was not necessary to examine whether the claimant was an independent contractor under

subdivision (d)(1) (now (4)(a) and (4)(b)) of this section because she was an agent-driver under subdivision (d)(2)(A) (now repealed) of this section, and that issue was not stated in the notice of hearing which was sent to the involved parties. *Melody's Kitchen v. Harris*, 114 Idaho 327, 757 P.2d 190 (1988).

### **Incidental to Service Within State.**

A claimant who owned his own truck-tractor which he used to pull trailers owned by his employer from state to state and had a large majority of hauls originate and terminate outside the state, was not covered under this section since the services performed by the claimant were not "incidental" to services performed within the state. *Heller v. International Transport, Inc.*, 94 Idaho 91, 481 P.2d 602 (1971).

### **Independent Contractor.**

The relation of principal and independent contractor was established where method of payment for services performed was by agreed percentage of the dollar volume of sales, there was no control of the salesman by the corporation nor of his equipment, salesman furnished his transportation at his own expense, no direction was made as to hours or days worked, salesman had no responsibility for funds paid by patrons for stocks as these moneys were paid over in their entirety to the corporation which forwarded the money for the stock transfer and at regular intervals paid the established commissions. *Moore v. Idaho Emp. Sec. Agency*, 84 Idaho 1, 367 P.2d 291 (1961).

Where salesmen paid by school on basis of commission for each student enrolled, furnished their own automobiles, paid their own expenses, worked whatever hours they chose and generally in whatever territory they found advantageous, they were not employees so as to render school liable for payment of excise taxes on them under Employment Security Law as their services were not covered employment as set out in subsection (d) of this section. *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1963).

A truck driver who owned his own truck-tractor and pulled trailers on a commission basis was an independent contractor and not an employee since he had the authority to hire subordinates, exercised this authority frequently, owned the major item of equipment used in hauling, and was completely responsible for all expenses on the tractor including insurance, repairs, and maintenance. *Hammond v. Department of Emp.*, 94 Idaho 66, 480 P.2d 912 (1971).

Payment for a result or by the job is an indicia that the relationship is one of contractee and independent contractor. *Department of Emp. v. Brown Bros. Constr.*, 100 Idaho 479, 600 P.2d 783 (1979).



As to whether a worker is engaged in an independent trade or business, the following factors are to be considered: (1) whether the worker had authority to hire subordinates; (2) whether the worker owned major items of equipment; and (3) whether either party would be liable to the other for a peremptory termination of the business relationship. *Department of Emp. v. Brown Bros. Constr.*, 100 Idaho 479, 600 P.2d 783 (1979); *Larsen v. State Dep't of Emp.*, 106 Idaho 382, 679 P.2d 659 (1984); *Hill v. State Dep't of Emp.*, 108 Idaho 583, 701 P.2d 203 (1985); *J.R. Simplot Co. v. State, Dep't of Emp.*, 110 Idaho 762, 718 P.2d 1200 (1986).

Because it is for the factfinder to determine whether the worker has the status of an independent contractor except in the clearest of cases, the appellate court will look to the record to determine if the decision of the Industrial Commission is supported by substantial and competent evidence. *Larsen v. State, Dep't of Emp.*, 106 Idaho 382, 679 P.2d 659 (1984).

Moving of sprinkler pipe is not work which demands particular skill, qualification or training, nor does it entail the use of highly specialized or expensive equipment and where the only items of equipment supplied by the workers were gloves, boots, and aprons, while all of the major equipment for the irrigation operation was supplied by the employer and the involvement of the pipe movers was only a part of the entire irrigation operation, the fact that employer's treatment of the pipe movers might be different than that typical of an employer-employee relationship did not make the service they provided "an independently established trade, occupation, profession, or business"; accordingly, there was no error in the commission's determination that employee had not established entitlement to an exemption from the application of the employment security provisions, under subdivision (d)(1) [now (4)(a)] of this section. *Larsen v. State, Dep't of Emp.*, 106 Idaho 382, 679 P.2d 659 (1984).

The Industrial Commission erred as a matter of law when it concluded that attorney by incorporating ipso facto became an employee of the corporation. *King v. State, Dep't of Emp.*, 110 Idaho 312, 715 P.2d 982 (1986).

Where potato loaders worked in remote locations without any direct supervision, they had authority to, and did, hire employees, and the sole responsibility for the compensation of those employees was that of the loader, the potato loaders supplied all tools necessary for the maintenance and/or repair of the equipment, together with welding equipment and torches, while the processing plant supplied two major pieces of equipment, and the loaders were required to provide their own food, lodging and fuel at the remote location, the

potato loaders were not employees who performed covered employment within the meaning of this section. *J. R. Simplot Co. v. State, Dep't of Emp.*, 110 Idaho 762, 718 P.2d 1200 (1986).

The mere fact of incorporation does not ipso facto render it impossible for sole shareholder-officers to be engaged in an independent occupation and contract with the corporation. *Software Assocs. v. State, Dep't of Emp.*, 110 Idaho 315, 715 P.2d 985 (1986).

The peremptory termination of a relationship continues to be only one of many factors to be considered, in determining whether a worker is an independent contractor or employee, and in any case is of diminished validity standing by itself. *J. R. Simplot Co. v. State, Dep't of Emp.*, 110 Idaho 762, 718 P.2d 1200 (1986).

### **Insurance Company.**

Where insurance company entered into a contract with its general agent and soliciting agent, with provisions requiring agent to devote his entire time to performance of duties under the contract, for termination for cause and upon 30 days' notice by either party, was not such "covered employment" as to come within the purview of this section. In re *Pacific Nat'l Life Assurance Co.*, 70 Idaho 98, 212 P.2d 397 (1949).

### **Intent of Legislature.**

By the language of this section it was the intent of the legislature to broaden the scope of covered employment as compared to that comprised in the common-law master and servant relationship, and the facts of the particular case determines what constitutes covered employment. In re *Pacific Nat'l Life Assurance Co.*, 70 Idaho 98, 212 P.2d 397 (1949).

### **Logging Superintendent.**

Logging superintendent of a lumber corporation was covered by this section though he was also the president of the corporation. *Eytchison v. Employment Sec. Agency*, 77 Idaho 448, 294 P.2d 593 (1956).

### **Mobile Home Court Lessee.**

Where lessee of mobile home court had authority to hire subordinates, owned office equipment for the management of the business, and was liable for peremptory termination of the lease, such facts were sufficient to constitute an independent business operator. *Swayne v. Department of Emp.*, 93 Idaho 101, 456 P.2d 268 (1969).

### **Payment of Federal Tax.**

Subsection (b) of this section did not apply where there was no showing that company involved had ever paid the federal tax upon the labor of its employees, or that any federal court had ever held that such labor was

taxable. *Chester B. Brown Co. v. Employment Sec. Agency*, 78 Idaho 166, 299 P.2d 487 (1956).

#### **Purpose of Act.**

The purpose of this act should not be thwarted in the name of uniformity by extending the meaning of the phrase "services performed in the employ" of an exempt organization to include services performed for all of its sources of income. In *re Gem State Academy Bakery*, 70 Idaho 488, 224 P.2d 529 (1950).

#### **Right of Control.**

The practice of law is uniquely an independent profession within the meaning of former subdivision (b)(1)(B) (now (4)(b)) of this section; therefore, in order to determine whether an attorney employed by a professional corporation is a covered employee a court need only address the "right to control" question raised by subdivision (d)(1)(A) (now (4)(a)) of this section. *King v. State, Dep't of Emp.*, 110 Idaho 312, 715 P.2d 982 (1986).

#### **Right of Discharge not Test of Employment Relationship.**

The right of discharge is not a decisive test of the relationship of either the employer-employee relationship or that of principal and independent contractor. *Moore v. Idaho Emp. Sec. Agency*, 84 Idaho 1, 367 P.2d 291 (1961).

#### **School Districts.**

As the later enactment, § 72-1316B, as added by S.L. 1961, ch. 112, § 1, p. 170, took precedence over this section as amended by S.L. 1959, ch. 252, § 1, p. 537, a school district was liable for the tax on its nonprofessional employees to May 18, 1963, which was the effective date of the 1963 amendment to this section, repealing former § 72-1316B. *Employment Sec. Agency v. Joint Class "A" Sch. Dist. No. 151*, 88 Idaho 384, 400 P.2d 377 (1965).

#### **Service Station.**

Operator of service station owned by corporation which took over partnership business was an employee where operator was obligated to follow instructions issued by corporation relative to operation of station. *Blue Bell Co. v. Employment Sec. Agency*, 75 Idaho 279, 270 P.2d 1054 (1954).

#### **Teachers.**

A claimant's duties as a teacher are not covered employment under this section and teachers were specifically exempted from the federal law (P.L. 93-567, 88 Stat. 1850, Dec. 31, 1974) which established the Special Unemployment Assistance Program. (See 26 U.S.C. § 3304) *Imel v. Department of Emp.*, 99 Idaho 224, 580 P.2d 70 (1978).

#### **Termination.**

The Idaho Administrative Code allows consideration of termination of employment without liability as a factor in both parts of the employment relationship inquiry found in § 72-1316(4), Idaho Admin. Code 09.01.35.112.03(d) and 09.01.35.112.04(n). *Excell Constr. v. State*, 141 Idaho 688, 116 P.3d 18 (2005).

#### **Test.**

The fundamental test of covered employment within the purview of this section is the right to control and direct the performance of the service, as distinguished from the right to control and direct certain definite results in conformity to the contract. In *re Pacific Nat'l Life Assurance Co.*, 70 Idaho 98, 212 P.2d 397 (1949).

Issue of employer-employee relationship is determined by common-law rules. *Blue Bell Co. v. Employment Sec. Agency*, 75 Idaho 279, 270 P.2d 1054 (1954).

For purposes of the Employment Security Law, covered employment shall not include any individual who, under the common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor. *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1963).

The present provision of subsection (d) of this section does not utilize the common-law term which was defined as including the right of control as well as actual control, as the present version speaks only of actual control, and such a legislative change of a common-law rule or term cannot be ignored. *Swayne v. Department of Emp.*, 93 Idaho 101, 456 P.2d 268 (1969).

#### **Transporting Mobile Homes.**

Where, pursuant to written agreement between house trailer convoy corporation and owner-operators whose trucks and services corporation hired, operator insured his own truck, paid all applicable workmen's compensation and liability insurance on other drivers he might hire, paid all maintenance expenses on his equipment, was privileged to refuse a haul and choose his own route and arrival time inter alia, there was sufficient indicia of the status of independent contractor and corporation was not required to pay employment security contributions for amount paid such haulers for services. *National Trailer Convoy v. Employment Sec. Agency*, 83 Idaho 247, 360 P.2d 994 (1961).

**Cited in:** *State, Dep't of Emp. v. Lenard's Trash Serv.*, 104 Idaho 299, 658 P.2d 970 (1983); *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987).



## DECISIONS UNDER PRIOR LAW

## ANALYSIS

Fish hatchery.

Intent of legislature.

**Fish Hatchery.**

An employee performing services in connection with the operation of a fish hatchery is in "covered employment" within the meaning of the Unemployment Compensation Law. *Meader v. Unemployment Comp. Div.*, 64 Idaho 716, 136 P.2d 984 (1943).

under the Unemployment Compensation Law, the legislature clearly expressed the intent that the provisions of such law should govern and not the common-law test of master and servant. *Continental Oil Co. v. Unemployment Comp. Div.*, 68 Idaho 194, 192 P.2d 599 (1947).

**Intent of Legislature.**

In determining the question of coverage

## RESEARCH REFERENCES

**A.L.R.** — Insurance agents or salesmen as within coverage of social security or unemployment compensation acts. 39 A.L.R.3d 872.

Part-time intermittent workers as covered

by or as eligible for benefits under State Unemployment Compensation Act. 95 A.L.R.3d 891.

**72-1316.1. Contributions payable by state. [Repealed.]**

## STATUTORY NOTES

**Compiler's Notes.** — This section which comprised 1959, ch. 252, § 3, p. 537 was

repealed by S.L. 1977, ch. 179, § 5, effective January 1, 1978.

**72-1316A. Exempt employment.** — "Exempt employment" means service performed:

- (1) By an individual in the employ of his spouse or child.
- (2) By a person under the age of twenty-one (21) years in the employ of his father or mother.
- (3) By an individual under the age of twenty-two (22) years who is enrolled as a student in a full-time program at an accredited nonprofit or public education institution for which credit at such institution is earned in a program which combines academic instruction with work experience. This subsection shall not apply to service performed in a program established at the request of an employer or group of employers.
- (4) In the employ of the United States government or an instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this chapter.
- (5) In the employ of a governmental entity in the exercise of duties:
  - (a) As an elected official;
  - (b) As a member of a legislative body, or a member of the judiciary, of a state or political subdivision thereof;
  - (c) As a member of the state national guard or air national guard;
  - (d) As an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or

(e) In a position which, pursuant to the laws of this state, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position which ordinarily does not require more than eight (8) hours per week.

(6) By an inmate of a correctional, custodial or penal institution, if such services are performed for or within such institution.

(7) In the employ of:

(a) A church or convention or association of churches; or

(b) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church, or convention or association of churches; or

(c) In the employ of an institution of higher education, if it is devoted primarily to preparation of a student for the ministry or training candidates to become members of a religious order; or

(d) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

(8) By a program participant in a facility that provides rehabilitation for individuals whose earning capacity is impaired by age, physical or mental deficiency, or injury or provides remunerative work for individuals who, because of their impaired physical or mental capacity, cannot be readily absorbed into the labor market.

(9) As part of an unemployment work relief program or as part of an unemployment work training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training.

(10) Service with respect to which unemployment insurance is payable under an unemployment insurance system established by an act of congress other than the social security act.

(11) As a student nurse in the employ of a hospital or nurses' training school by an individual who is enrolled and is regularly attending courses in a nurses' training school approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a course in a medical school approved pursuant to state law.

(12) By an individual under the age of eighteen (18) years of age in the delivery or distribution of newspapers or shopping news not including delivery or distribution to any point for subsequent delivery or distribution.

(13) By an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission.

(14) By an individual for a real estate broker as an associate real estate broker or as a real estate salesman, if all such service performed by such individual for such person is performed for remuneration solely by way of commission.

(15) Service covered by an election approved by the agency charged with the administration of any other state or federal unemployment insurance law, in accordance with an arrangement pursuant to section 72-1344, Idaho Code.



(16) In the employ of a school or college by a student who is enrolled and regularly attending classes at such school or college.

(17) In the employ of a hospital by a resident patient of such hospital.

(18) By a member of an AmeriCorps program.

(19) By an individual who is paid less than fifty dollars (\$50.00) per calendar quarter for performing work that is not in the course of the employer's trade or business, and who is not regularly employed by such employer to perform such service. For the purposes of this subsection, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if:

(a) On each of some twenty-four (24) days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

(b) Such individual was so employed by such employer in the performance of such service during the preceding calendar quarter. [I.C., § 72-1316A, as added by 1977, ch. 179, § 4, p. 464; am. 1978, ch. 112, § 1, p. 232; am. 1979, ch. 110, § 1, p. 348; am. 1982, ch. 326, § 4, p. 807; am. 1993, ch. 119, § 2, p. 297; am. 1997, ch. 363, § 1, p. 1070; am. 1998, ch. 1, § 18, p. 3; am. 2005, ch. 5, § 2, p. 6.]

### STATUTORY NOTES

**Prior Laws.** — Former § 72-1316A which comprised I.C., § 72-1316A, as added by 1959, ch. 252, § 2, p. 537; am. 1971, ch. 142, § 5, p. 595; am. 1974, ch. 72, § 1, p. 1153 was repealed by S.L. 1977, ch. 179, § 3, effective January 1, 1978.

**Federal References.** — The Social Security Act referred to in paragraph (10) is com-

piled as Title 42 U.S.C. § 301 et seq.

**Effective Dates.** — Section 2 of S.L. 1997, ch. 363 declared an emergency. Approved March 24, 1997.

Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

### JUDICIAL DECISIONS

#### ANALYSIS

Insurance agent.

— Commission.

Religious organizations.

#### Insurance Agent.

##### — Commission.

Where the insurance agent received remuneration solely by way of commission, this section relieved the insurance company of any obligation to pay state unemployment insurance taxes on his behalf. *Anderson v. Farm Bureau Mut. Ins. Co.*, 112 Idaho 461, 732 P.2d 699 (Ct. App. 1987).

#### Religious Organizations.

A bakery operated and controlled by a convention or association of churches was insofar as the employees of the bakery were concerned, operated primarily for religious purposes; hence, their services were not "covered employment" under the Idaho unemployment security law. *Department of Emp. v. Cham-*

*pion Bake-N-Serve, Inc.*, 100 Idaho 53, 592 P.2d 1370 (1979).

Even if an organization meets the requirements of this section so as to qualify for an exemption from paying state unemployment insurance taxes, it is not exempt under the Idaho employment security law if it is required to pay the taxes imposed by the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 — 3309. *State, Dep't of Emp. v. Idaho Allied Christian Forces*, 105 Idaho 312, 669 P.2d 201 (1983).

Where the Idaho Allied Christian Forces (IACF) was a separately incorporated organization of persons who paid an annual membership fee and stated their belief in Jesus Christ, where the IACF was distinct from the various churches which supported its princi-

ples, and where the IACF was operated, supervised, and controlled by an independent board of directors consisting of 15 people who were elected annually by the members of the organization, the IACF was not operated, controlled or principally supported by an "association of churches" within the meaning of this section so as to qualify for an exemption from state unemployment insurance taxes, nor was IACF an exempt organization of the type described in (former) subdivision (g)(1)(i) of this section. *State, Dep't of Emp. v. Idaho Allied Christian Forces*, 105 Idaho 312, 669 P.2d 201 (1983).

The religious school was operated primarily for religious purposes and was principally supported by an association of churches under this section, where several different churches were united by their relationship to the school, the school had a religious mission

and purpose, and the school could not exist as a private school without the moral support of those several churches. *Nampa Christian Schools Found., Inc. v. State ex rel. Department of Emp.*, 110 Idaho 918, 719 P.2d 1178 (1986).

Where the purpose behind the religious school was not so much to declare a specific body of doctrine, as it was to provide students with a religious education that supported the body of doctrine with which a wide number of fundamentalist churches could agree, there was no evidence of a definite ecclesiastical government nor a membership unassociated with other churches, and the school did not use ordained ministers, the religious school was not a church for the purposes of this section. *Nampa Christian Schools Found., Inc. v. State ex rel. Department of Emp.*, 110 Idaho 918, 719 P.2d 1178 (1986).

## **72-1316B. Termination of coverage of certain governmental entities. [Repealed.]**

### **STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1316B, as added by 1977, ch. 179, § 19, p. 464, was repealed by S.L. 1998, ch. 1, § 19, effective July 1, 1998.

**72-1317. Cut-off date.** — September 30 immediately following the computation date is designated as the cut-off date for experience rating purposes. [1947, ch. 269, § 17, p. 793; am. 1949, ch. 144, § 17, p. 252; am. 1951, ch. 236, § 3, p. 482; am. 1998, ch. 1, § 20, p. 3.]

### **JUDICIAL DECISIONS**

**Cited in:** *In re Markham's, Inc.*, 79 Idaho 307, 316 P.2d 553 (1957); *Holly Care Center v. State, Dep't of Emp.*, 110 Idaho 76, 714 P.2d 45 (1986).

**72-1318. Director — Department.** — "Director" means the director of the department of commerce and labor, the individual appointed pursuant to section 59-904, Idaho Code.

"Department" means the department of commerce and labor. [1947, ch. 269, § 18, p. 793; am. 1949, ch. 144, § 18, p. 252; am. 1976, ch. 141, § 1, p. 517; am. 1998, ch. 1, § 21, p. 3; am. 2004, ch. 346, § 11, p. 1029.]

### **STATUTORY NOTES**

**Cross References.** — Executive director to administer act, § 72-1331.

**72-1319. Eligible employer.** — (1) "Eligible employer" means a covered employer who has completed a qualifying period as defined in subsection (2) of this section, and who has filed all payroll reports required, has paid, on or before the cut-off date, all contributions and penalties due and



has established a record of accumulated contributions in excess of benefits charged to his account. For the purposes of this section, delinquencies of a minor nature may be disregarded if the director is satisfied that such covered employer has acted in good faith and that forfeiture of a reduced taxable wage rate because of such minor delinquency would be inequitable.

(2) "Qualifying period" shall be the period of three (3) consecutive years ending on the computation date in which, during all of said years, the employer shall be chargeable for benefits under this state law, except, that a new employer shall have a qualifying period of one (1) year ending on the computation date in which, during all of said year, the employer shall be chargeable for benefits under this state law. [1947, ch. 269, § 19, p. 793; am. 1949, ch. 144, § 19, p. 252; am. 1951, ch. 236, § 4, p. 482; am. 1955, ch. 18, § 2, p. 20; am. 1957, ch. 158, § 1, p. 274; am. 1963, ch. 314, § 2, p. 841; am. 1967, ch. 117, § 6, p. 233; am. 1991, ch. 119, § 2, p. 248; am. 1998, ch. 1, § 22, p. 3.]

### STATUTORY NOTES

**Cross References.** — Experience rating, § 72-1351.

state law" refer to S.L. 1947, ch. 269, compiled as §§ 72-1301 — 72-1379.

**Compiler's Notes.** — The words "this

### JUDICIAL DECISIONS

#### ANALYSIS

Delinquent employer.  
Reduced ratings.

#### Delinquent Employer.

Administratively determining that any delinquency over \$20.00 is "major" delinquency renders virtually meaningless the statutory distinction the legislature intended; therefore the Department of Employment Rules 09.35.062 and 09.35.063 are invalid because they contravene statutory law by erasing, for all practical purposes, distinctions that were legislatively created and mandated. *Holly Care Center v. State, Dep't of Emp.*, 110 Idaho 76, 714 P.2d 45 (1986).

To accommodate the legislature's intent, as spelled out by this section, the Department of Employment must allow a procedure for the director to consider the employer's explanation for becoming delinquent. For those delinquencies that are minor, the Department must further decide if the employer has acted in good faith and if removal of the employer's favorable tax status would be inequitable. *Holly Care Center v. State, Dep't of Emp.*, 110 Idaho 76, 714 P.2d 45 (1986).

It is evident that the legislature intended a distinction to be made between employers with major tax delinquencies and employers with minor tax delinquencies; those employers with minor delinquencies may be excused by the director of employment from their

errors and allowed to continue in the favorable tax bracket where there is a showing that they have acted in good faith and that removing the favorable tax status would be inequitable. *Holly Care Center v. State, Dep't of Emp.*, 110 Idaho 76, 714 P.2d 45 (1986).

#### Reduced Ratings.

A denial of a reduced rating to an employer earned through a period close to ten years would be inequitable upon a showing that the failure to submit the required tax reports to the employment security agency by the employer as required was in a minor nature, due to change in bookkeepers, the employer having acted in good faith and never before through said period years having been delinquent, always maintaining a special account in which tax accruals were deposited, further that the said employer acted promptly upon discovery of the nonsubmission of the required report. *In re Markham's, Inc.*, 79 Idaho 307, 316 P.2d 553 (1957).

The board under its granted broad powers was clearly authorized to rehear the entire controversy of the determination by the chief of contributions that the involved corporation was ineligible for reduced contribution rate, to make its own findings of fact and draw its own conclusions and was not limited to ques-

tions of law. In re Markham's, Inc., 79 Idaho 307, 316 P.2d 553 (1957).

**72-1319A. Deficit employer.** — “Deficit employer” means a covered employer who has established a record of accumulated benefits charged to his account in excess of his accumulated contributions paid as of the cut-off date. [I.C., § 72-1319A, as added by 1963, ch. 314, § 3, p. 841; am. 1998, ch. 1, § 23, p. 3.]

**72-1319B. Taxable wage rate.** — “Taxable wage rate” means the numerical values calculated in accordance with section 72-1350, Idaho Code, for the purpose of establishing contribution rates, training tax rates and reserve tax rates for covered employers. [I.C., § 72-1319B, as added by 1991, ch. 119, § 3, p. 248; am. 1996, ch. 415, § 1, p. 1378; am. 1998, ch. 1, § 24, p. 3; am. 2005, ch. 5, § 3, p. 6.]

#### STATUTORY NOTES

**Effective Dates.** — Section 17 of S.L. 2005, ch. 5 declared an emergency retroactively to January 1, 2005 and approved February 7, 2005.

**72-1320. Crew leader.** — “Crew leader” means an individual who:

(1) Furnishes individuals to perform agricultural labor for any other person;

(2) Pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them; and

(3) Has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. [I.C., § 72-1320, as added by 1977, ch. 179, § 7, p. 464; am. 1998, ch. 1, § 25, p. 3.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-1320 which comprised 1947, ch. 269, § 20, p. 793; am. 1949, ch. 144, § 20, p. 252 was repealed by S.L. 1977, ch. 179, § 6, effective January 1, 1978.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**72-1321. Employment office. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised 1947, ch. 269, § 21, p. 793; am. 1949, ch. 144, § 21, p. 252, was repealed by S.L. 1998, ch. 1, § 26, effective July 1, 1998.

**72-1322. Experience rating.** — “Experience rating” means a method of determining variable taxable wage rates allowed to covered employers. [1947, ch. 269, § 22, p. 793; am. 1949, ch. 144, § 22, p. 252; am. 1963, ch. 314, § 4, p. 841; am. 1991, ch. 119, § 4, p. 248; am. 1998, ch. 1, § 27, p. 3.]



## JUDICIAL DECISIONS

**Cited in:** In re Central Eureka Corp., 76 Idaho 287, 281 P.2d 665 (1955).

**72-1322A. Hospital.** — “Hospital” means any institution which has been licensed by, certified, or approved by the state board of health and welfare as a hospital. [I.C., § 72-1322A, as added by 1971, ch. 142, § 6, p. 595; am. 1998, ch. 1, § 28, p. 3.]

**72-1322B. Educational institution.** — “Educational institution” means:

(1) An institution of higher education which:

(a) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate; and

(b) Is authorized to provide a program of education beyond high school; and

(c) Provides an educational program for which it awards a bachelor’s or higher degree, or provides a program which is acceptable for full credit toward such a degree, or a program of training to prepare students for gainful employment in a recognized occupation.

(2) A primary or secondary school which provides education from pre-school and kindergarten through grade twelve (12). [I.C., § 72-1322B, as added by 1971, ch. 142, § 7, p. 595; am. 1977, ch. 179, § 8, p. 464; am. 1978, ch. 112, § 3, p. 232; am. 1998, ch. 1, § 29, p. 3.]

**72-1322C. Governmental entity.** — “Governmental entity” means this state or any of its instrumentalities, political subdivisions, or districts of whatever type or nature including, but not limited to, school districts, cities, counties, taxing districts, or other entities, as well as any instrumentality of one (1) or more of the foregoing or that is jointly owned by this state or a political subdivision thereof and one (1) or more other states or political subdivisions of this or other states, if service for any such governmental entity is excluded from “employment” as defined in the federal unemployment tax act, 26 U.S.C. 3306(c)(7). [I.C., § 72-1322C, as added by 1978, ch. 112, § 5, p. 232; am. 1998, ch. 1, § 30, p. 3.]

## STATUTORY NOTES

**Prior Laws.** — The former § 72-1322C by 1977, ch. 179, § 9, p. 464 was repealed by which comprised I.C., § 72-1322C, as added S.L. 1978, ch. 112, § 4.

**72-1322D. Nonprofit organization.** — “Nonprofit organization” means a religious, charitable, educational, or other organization which is described in section 501(c)(3) of the federal internal revenue code and which is exempt from tax under section 501(a) of such code. [I.C., § 72-1322D, as added by 1998, ch. 1, § 31, p. 3.]

## STATUTORY NOTES

**Federal References.** — Section 501(c)(3) of the federal income tax revenue code, referred to in this section, is codified as 26 U.S.C. § 501 (c)(3).

**72-1323. Interested parties.** — “Interested party” with respect to a claim for benefits means the claimant, the claimant’s last regular employer, the employer whose account is chargeable for experience rating purposes, the cost reimbursement employer who may be billed for any portion of benefits claimed, and the director or an authorized representative of any of them; “interested party” with respect to proceedings involving employer liability means the employer and the director or an authorized representative. [1947, ch. 269, § 23, p. 793; am. 1949, ch. 144, § 23, p. 252; am. 1951, ch. 236, § 5, p. 482; am. 1980, ch. 264, § 3, p. 682; am. 1998, ch. 1, § 32, p. 3.]

## JUDICIAL DECISIONS

**Cited in:** *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961); *Garrett v. Kline*, 87 Idaho 456, 394 P.2d 157 (1964); *Fouste v. Department of Emp.*, 97 Idaho 162, 540 P.2d 1341 (1975); *Tendoy Area Council v. State, Dep’t of Emp.*, 105 Idaho 317, 670 P.2d 1302 (1983).

**72-1324. Payroll.** — “Payroll” means the amount of wages, as defined in section 72-1328, Idaho Code, paid by a covered employer for covered employment. [1947, ch. 269, § 24, p. 793; am. 1949, ch. 144, § 24, p. 252; am. 1998, ch. 1, § 33, p. 3.]

## STATUTORY NOTES

**Cross References.** — Wages defined, § 72-1328.

**72-1325. Person.** — “Person” means any individual and any other entity recognized by Idaho law, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor of any of the foregoing, or the legal representative of a deceased person. [1947, ch. 269, § 25, p. 793; am. 1949, ch. 144, § 25, p. 252; am. 1998, ch. 1, § 34, p. 3.]

**72-1326. Quarterly payroll. [Repealed.]**

## STATUTORY NOTES

**Compiler’s Notes.** — This section, which comprised 1947, ch. 269, § 26, p. 793; am. 1949, ch. 144, § 26, p. 252, was repealed by S.L. 1998, ch. 1, § 35, effective July 1, 1998.

**72-1327. State.** — “State” includes, in addition to the states of the United States of America, the District of Columbia, the Dominion of Canada, the Commonwealth of Puerto Rico, and the Virgin Islands. [1947, ch. 269, § 27, p. 793; am. 1949, ch. 144, § 27, p. 252; am. 1965, ch. 170, § 2, p. 331; am. 1977, ch. 179, § 10, p. 464; am. 1998, ch. 1, § 36, p. 3.]



**72-1327A. Valid claim.** — “Valid claim” means any application for benefits which is found to be eligible as provided in section 72-1367, Idaho Code, and which has been filed in accordance with this chapter and such rules as the director may prescribe. [I.C., § 72-1327A, as added by 1967, ch. 117, § 7, p. 233; am. 1998, ch. 1, § 37, p. 3.]

**72-1328. Wages.** — (1) “Wages” shall include:

- (a) All remuneration for personal services from whatever source, including commissions and bonuses and the cash value of all remuneration in any medium other than cash;
- (b) All tips received while performing services in covered employment totaling twenty dollars (\$20.00) or more in a month, which are reported in writing to the employer as required under federal law;
- (c) Any employer contribution under a qualified cash or deferred agreement as defined in 26 U.S.C. 401(k) to the extent such contribution is not included in gross income by reason of 26 U.S.C. 402(a)(8).

(2) The term “wages” shall not include:

- (a) Payments (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment), made to, or on behalf of, an individual or any of his dependents under a plan established by an employer which makes provision generally for individuals performing service for him (or for such individuals generally and their dependents) or for a class or classes of such individuals (or for a class or classes of such individuals and their dependents), on account of (i) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term “wages” only payments which are received under a worker’s compensation law), or (ii) medical or hospitalization expenses in connection with sickness or accident disability, or (iii) death;
- (b) Payments on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an individual performing services for him after the expiration of six (6) calendar months following the last calendar month in which the individual performed services for such employer;
- (c) Payments made by an employer to, or on behalf of, an individual performing services for him or his beneficiary (i) from or to a trust described in section 401(a) of the Federal Internal Revenue Code which is exempt from tax under section 501(a) of the Federal Internal Revenue Code at the time of such payment unless such payment is made to an individual performing services for the trust as remuneration for such services and not as a beneficiary of the trust, or (ii) under or to an annuity plan which, at the time of such payments, is a plan described in section 403(a) of the Federal Internal Revenue Code, under a cafeteria plan within the meaning of section 125 of the Federal Internal Revenue Code;
- (d) Payments made by an employer (without deduction from the remuneration of the individual in its employ) of the tax imposed upon an individual in his employ under section 3101 of the Federal Internal Revenue Code; or

(e) Noncash payments for farm work.

(3) Any third party which makes a sickness or accident disability payment, which is not excluded from wages under subsection (2)(a)(i) of this section, shall be treated as the employer with respect to such payment of wages for the purposes of this chapter. [1947, ch. 269, § 28, p. 793; am. 1949, ch. 144, § 28, p. 252; am. 1951, ch. 104, § 3, p. 233; am. 1955, ch. 18, § 3, p. 20; am. 1963, ch. 314, § 5, p. 841; am. 1971, ch. 142, § 8, p. 595; am. 1975, ch. 126, § 2, p. 259; am. 1981, ch. 144, § 1, p. 248; am. 1982, ch. 326, § 5, p. 807; am. 1986, ch. 25, § 1, p. 77; am. 1989, ch. 57, § 2, p. 78; am. 1998, ch. 1, § 38, p. 3.]

### STATUTORY NOTES

**Cross References.** — Experience rating, § 72-1351.

Payment of contributions, § 72-1349.

Rate and base of contributions, § 72-1350.

**Federal References.** — Sections 125, 401, 501 and 3101 of the Federal Internal Revenue

Code are compiled as 26 U.S.C. §§ 125, 401, 501 and 3101.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

### JUDICIAL DECISIONS

#### ANALYSIS

Compensation not included as wages.

Computation of wages paid.

Credit upon existing debt.

Earned increment a deduction.

#### Compensation Not Included as Wages.

Wages include all remunerations, including commissions, for personal services but, do not include those allowances or reimbursements for reasonable or ordinary expenses incurred for business reasons which the employee includes in itemized statements to his employer and which are clearly differentiated between the employee's wages and business expenses in the employer's records. *Department of Emp. v. Kasum Communications*, 97 Idaho 372, 544 P.2d 1142 (1976).

Plaintiff appealed the decision of the Industrial Commission of the State of Idaho affirming a determination that services performed by plaintiff's sales representatives came within the scope of employment covered by unemployment compensation and that commissions paid by plaintiff to its sales representatives were wages for employment security fund contribution purposes. The Industrial Commission's findings were not supported by substantial and competent evidence. Thus, the order of the Industrial Commission was vacated and remanded. *Vendx Mktg. Co. v. Department of Emp.*, 122 Idaho 890, 841 P.2d 420 (1992).

#### Computation of Wages Paid.

Corporation which acquired partnership in 1953 was entitled to add the wages paid the

retained employees by the partnership during the first two quarters to those paid during the last two quarters by the corporation in computing the exemption on wages paid retained employees. *In re Central Eureka Corp.*, 76 Idaho 287, 281 P.2d 665 (1955).

#### Credit upon Existing Debt.

Remuneration earned, not remuneration received, is the test under this section; therefore where a person performed services for which he was given credit upon an existing debt, he received wages within the meaning of this statute. *Cahoon v. Employment Sec. Agency*, 82 Idaho 224, 351 P.2d 477 (1960).

#### Earned Increment a Deduction.

Claimant, a carpenter, upon termination of his employment by reason of the completion of the project, filed claim for unemployment benefits and was thereafter paid benefits. Excluding a short employment interval and vacation period, the unemployed carpenter commenced constructing a dwelling on two lots he owned, doing this in his spare time while unemployed and such was held to be an increment of his estate equal to, if not greater than, the wages he would have been required to pay other artisans to work for him and he was held fully employed and receiving actual wages, and therefore not entitled to compensation benefits, but since he had received them in good



faith was not required to repay benefits received. *Hatch v. Employment Sec. Agency*, 79 Idaho 246, 313 P.2d 1067 (1957).

**Cited in:** *In re Pacific Nat'l Life Assurance Co.*, 70 Idaho 98, 212 P.2d 397 (1949); *Corwin*

*v. Sunshine Mining Co.*, 96 Idaho 211, 525 P.2d 993 (1974); *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975); *Melody's Kitchen v. Harris*, 114 Idaho 327, 757 P.2d 190 (1988).

#### DECISIONS UNDER PRIOR LAW

##### **Commissions as Wages.**

Liability for unemployment excise tax could not be avoided by an employer by reason of remuneration in the form of "commissions"

instead of "wages." *Continental Oil Co. v. Unemployment Comp. Div.*, 68 Idaho 194, 192 P.2d 599 (1947).

**72-1329. Waiting week.** — "Waiting week" means the first week of a benefit year that meets the criteria for a compensable week in section 72-1312(1) through (4), Idaho Code, but for which no benefits will be paid to the claimant. Every claimant shall have a waiting week each benefit year. [1947, ch. 269, § 29, p. 793; am. 1949, ch. 144, § 29, p. 252; am. 1955, ch. 18, § 4, p. 20; am. 1963, ch. 316, § 3, p. 864; am. 1965, ch. 170, § 3, p. 331; am. 1981, ch. 168, § 2, p. 294; am. 1998, ch. 1, § 39, p. 3.]

#### STATUTORY NOTES

**Cross References.** — Personal eligibility conditions, § 72-1366.

ch. 168 declared an emergency. Approved March 31, 1981.

**Effective Dates.** — Section 3 of S.L. 1981,

**72-1330. Week.** — "Week" means a period of seven (7) consecutive days ending at midnight on Saturday. [1947, ch. 269, § 30, p. 793; am. 1949, ch. 144, § 36, p. 252; am. 1951, ch. 104, § 4, p. 233; am. 1998, ch. 1, § 40, p. 3.]

**72-1331. Administration.** — The employment security law shall be administered by the director, who shall be appointed by the governor. Any appointments made under this section shall be confirmed by the state senate. [1947, ch. 269, § 31, p. 793; am. 1949, ch. 144, § 31, p. 252; am. 1951, ch. 104, § 5, p. 233; am. 1965, ch. 44, § 1, p. 67; am. 1974, ch. 16, § 2, p. 304; am. 1976, ch. 141, § 2, p. 517; am. 1996, ch. 421, § 1, p. 1406; am. 1998, ch. 1, § 41, p. 3.]

#### JUDICIAL DECISIONS

**Cited in:** *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001).

**72-1332. Authority and duties of the commission.** — The commission is authorized to hear and decide matters appealed to it in accordance with the provisions of this chapter and the federal unemployment tax act. In addition to salaries paid from the industrial administration fund each member of the commission shall receive a salary to be paid from the employment security administration fund in an amount equal to one-half (½) of the salary paid from the industrial administration fund. Prior to the beginning of each fiscal year, the department and the commission shall

negotiate an amount to be paid the commission to reimburse it for the cost of personal and nonpersonal services involved in hearing appeals as provided in section 72-1368(6), Idaho Code. [1947, ch. 269, § 32, p. 793; am. 1949, ch. 144, § 32, p. 252; am. 1951, ch. 104, § 6, p. 233; am. 1955, ch. 18, § 5, p. 20; am. 1955, ch. 198, § 2, p. 427; am. 1976, ch. 261, § 1, p. 881; am. 1980, ch. 256, § 2, p. 667; am. 1998, ch. 1, § 42, p. 3.]

### STATUTORY NOTES

**Federal References.** — The Federal Unemployment Tax Act, referred to in the first sentence, is compiled as 26 U.S.C. §§ 3301 — 3311.

**Effective Dates.** — Section 3 of S.L. 1955, ch. 198 provided such act should be effective on and after July 1, 1955.

### JUDICIAL DECISIONS

#### Rehearing Controversies.

The board under its granted broad powers was clearly authorized to rehear the entire controversy of the determination by the chief of contributions that the involved corporation

was ineligible for reduced contribution rate, to make its own findings of fact and draw its own conclusions and was not limited to questions of law. In re Markham's, Inc., 79 Idaho 307, 316 P.2d 553 (1957).

### DECISIONS UNDER PRIOR LAW

#### ANALYSIS

Administration of act.  
Facts alleged in complaint.

#### Administration of Act.

Under the provisions of the 1941 amendatory act, ch. 182, the industrial accident board was charged with administration of the law as well as the duty to investigate and determine which employers were within the law and required to pay tax. State v. Ada County Dairymen's Ass'n, 66 Idaho 317, 159 P.2d 219 (1945).

#### Facts Alleged in Complaint.

In action to recover unemployment compensation taxes and penalties, the complaint had to allege facts sufficient to show that defendant was a covered employer within the meaning of the law. State v. Ada County Dairymen's Ass'n, 66 Idaho 317, 159 P.2d 219 (1945).

## 72-1333. [Amended and Redesignated.]

### STATUTORY NOTES

**Compiler's Notes.** — This section is amended and redesignated as § 67-4702, pursuant to S.L. 2004, ch. 346, § 4.

**72-1334. Publications.** — The director shall print for distribution to the public labor and workforce development information and any other material deemed relevant and shall furnish the same upon request. [1947, ch. 269, § 34, p. 793; am. 1949, ch. 144, § 34, p. 252; am. 1998, ch. 1, § 44, p. 3.]

**72-1335. Personnel.** — (1) The director is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, employees, and other persons as may be necessary. The director may



delegate to any such person such power and authority as he deems reasonable and proper for the effective administration of this chapter, and may, in the time, form and manner prescribed by chapter 8, title 59, Idaho Code, bond persons handling moneys or signing checks hereunder, such bond to be paid from the employment security administration fund.

(2)(a) Subject only to the provisions of this chapter and such rules as the director may prescribe, the director is authorized and directed to establish and maintain a group pension plan providing retirement, disability, and death benefits for employees of the department through the means of group contracts negotiated with an insurer, licensed and qualified to do business under the laws of the state of Idaho.

(b) Employees covered by the plan shall include all employees (other than temporary and hourly-rated employees) who are in employee status with the department and whose employment commenced before October 1, 1980.

(c) Credited service shall mean all service by employees in the employ of the department (exclusive of leaves without pay other than military leave) as follows:

(i) Past service rendered prior to the effective date of the plan by employees; for this purpose prior service shall include service in any of the predecessor, component organizations thereof, as determined appropriate by the director on the effective date, and shall also include leave-of-absence for military service occurring within a period of otherwise continuous service in any such predecessor organizations.

(ii) Future service rendered on and after said effective date.

(iii) An employee of the department placed on loan or special duty with other governmental units may be deemed to be in credited service when the costs of continuing credited service are made reimbursable in accordance with an agreement approved by the director.

(d) For each year of credited service each employee covered under the plan shall receive a monthly pension commencing upon retirement at or after age sixty-five (65) and continuing until death, of not less than one and one-half percent (1 ½%) of monthly earnings, except that appropriate schedules and conditions for service retirement, early retirement, disability retirement, and contingency annuity options shall be included in the insurance plan. Notwithstanding any other provisions of this section to the contrary, the director is authorized and directed to negotiate with the insurer to invest any interest, dividends, earnings, or other moneys accruing to the funds financing the employees' retirement program with the insurer to purchase additional retirement benefits. The purchase of said additional benefits shall be contingent upon actuarial appraisals of the plan and shall be based on sound actuarial principles. Total retirement benefits to be provided under the program shall meet the requirements of the Internal Revenue Service for integration purposes.

(e) The cost of past service, future service and disability pensions shall be calculated according to sound actuarial principles. The costs of the plan, including funding of past service pensions which shall be funded over a period of time consistent with good insurance practices, shall be paid from

administrative funds available to the department. Each employee covered under the plan shall by payroll deduction contribute toward the cost of future service pensions at not less than the rate paid by the department, but not to exceed seven percent (7%) of monthly earnings.

(f) Upon termination of service, an employee may elect to receive the refund of his contributions plus interest or may elect to have the tax-deferred contributions and interest directly rolled over to an individual retirement account or annuity or to another qualified retirement plan that accepts the roll over, pursuant to 26 U.S.C. 402(c). A vested employee, as provided in the insurance contract, who leaves his contributions in the plan will remain entitled to the pension purchased by the contributions made on his behalf, and all other privileges under the plan.

(g) If an employee dies more than ten (10) years before his normal retirement date, all of his contributions plus interest will be returned to a previously-named beneficiary, subject to survivor benefits as provided in the plan. The following provisions of this subsection shall be subject to a contingency annuity option. If an employee dies on or after the date ten (10) years prior to his normal retirement date, it will be assumed that he retired on the first day of the month following his date of death, and his beneficiary shall receive, beginning on the assumed retirement date, one hundred twenty (120) monthly pension payments. The amount of monthly pension payable will be based on the credit accrued to that time and the employee's assumed earlier retirement age. If death occurs after retirement but before one hundred twenty (120) monthly pension payments have been made, the monthly pension will be continued to his beneficiary until a total of one hundred twenty (120) monthly payments have been made. [1947, ch. 269, § 35, p. 793; am. 1949, ch. 144, § 35, p. 252; am. 1959, ch. 29, § 1, p. 62; am. 1965, ch. 116, § 1, p. 223; am. 1971, ch. 136, § 49, p. 522; am. 1973, ch. 107, § 1, p. 189; am. 1994, ch. 210, § 1, p. 665; am. 1997, ch. 217, § 1, p. 639; am. 1998, ch. 1, § 45, p. 3.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 87 of S.L. 1971, ch. 136 declared an emergency. Approved March 18, 1971.

**72-1336. Advisory body and special committees.** — (1) The governor shall appoint a workforce development council in accordance with section 111 of the federal workforce investment act of 1998, as amended (29 U.S.C. 2821) and federal regulations promulgated thereunder. Members of the body shall serve at the pleasure of the governor and shall be reimbursed for ordinary and actual expenses. The governor shall prescribe the duties and functions of the workforce development council which shall include, but not be limited to, the following:

(a) To serve as an advisory body to the department on matters related to workforce development policy and programs;



(b) To approve and provide oversight of department expenditures from the employment security special administration fund established under section 72-1347A, Idaho Code;

(c) To develop and provide oversight of procedures, criteria and performance measures for the workforce development training fund established under section 72-1347B, Idaho Code; and

(d) To serve as the state workforce investment board in accordance with section 111 of the federal workforce investment act of 1998, as amended, and federal regulations promulgated thereunder.

(2) The director may appoint special committees in connection with the administration of this chapter. [1947, ch. 269, § 36, p. 793; am. 1949, ch. 144, § 36, p. 252; am. 1949, ch. 272, § 1, p. 551; am. 1951, ch. 104, § 8, p. 233; am. 1961, ch. 294, § 1, p. 517; am. 1965, ch. 44, § 2, p. 67; am. 1996, ch. 62, § 2, p. 180; am. 1998, ch. 1, § 46, p. 3; am. 2005, ch. 13, § 5, p. 39.]

### STATUTORY NOTES

**Effective Dates.** — Section 4 of S.L. 1996, ch. 62 declared an emergency and provided that § 2 (this section) should be in full force

and effect on and after passage and approval. Approved March 5, 1996.

**72-1337. Records and reports.** — (1) Each employer that is a “covered employer,” as defined in section 72-1315, Idaho Code, shall complete and submit to the director an Idaho business registration form within six (6) months of becoming a covered employer.

(2) Each employer shall keep accurate records, for such periods of time and containing such information as the director may prescribe. Such records shall be open to inspection and be subject to being copied by the director at any reasonable time. The director, a member of the commission or an appeals examiner may require from any employer any sworn or unsworn reports which are deemed necessary in the exercise of their duties. [1947, ch. 269, § 37, p. 793; am. 1949, ch. 144, § 37, p. 252; am. 1998, ch. 1, § 47, p. 3; am. 2005, ch. 5, § 4, p. 6.]

### STATUTORY NOTES

**Compiler's Notes.** — The word “commission” was substituted for the word “board” on the authority of S.L. 1971, ch. 124, § 3, p. 422, compiled herein as § 72-502, which provided that the references to the “industrial accident

board” and “board” were deemed to be references to the “industrial commission.”

**Effective Dates.** — Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

### JUDICIAL DECISIONS

#### Constitutionality.

Since the records that the department of employment requires an employer to keep cannot be used against him in a criminal matter if he invokes the privilege in that

matter as provided by § 72-1340, the reporting requirements of this section do not violate his fifth amendment right against self-incrimination. *Hill v. State, Dep't of Emp.*, 108 Idaho 583, 701 P.2d 203 (1985).

**72-1338. Oaths and witnesses.** — The director, a member of the commission, and an appeals examiner shall have power to administer oaths

and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of evidence deemed necessary in connection with a disputed claim or in the exercise of their duties. [1947, ch. 269, § 38, p. 793; am. 1949, ch. 144, § 38, p. 252; am. 1998, ch. 1, § 48, p. 3.]

#### STATUTORY NOTES

**Compiler's Notes.** — The word "commission" was substituted for "board" on the authority of S.L. 1971, ch. 124, § 3, p.422, compiled herein as § 72-502, which provided that

the references to the "industrial accident board" and "board" were deemed to be references to the "industrial commission."

**72-1339. Enforcement of subpoenas.** — Any subpoena issued pursuant to section 72-1338, Idaho Code, may be enforced by the district courts of this state within the jurisdiction in which the inquiry is being conducted or within the jurisdiction in which the person to whom the subpoena was issued resides or conducts his business. The court shall have jurisdiction to hear the parties, determine the reasonableness of the subpoena, and set aside, modify, or enforce the subpoena by its order in accordance with the evidence. Any failure to obey such court order may be punished by the court as a contempt thereof. [1947, ch. 269, § 39, p. 793; am. 1949, ch. 144, § 39, p. 252; am. 1998, ch. 1, § 49, p. 3.]

#### STATUTORY NOTES

**Cross References.** — Issuance of subpoenas, § 72-1338.

#### JUDICIAL DECISIONS

**Cited in:** Link's Sch. of Bus. v. Emp. Secur. Agency, 85 Idaho 519, 380 P.2d 506 (1963).

**72-1340. Protection against self-incrimination.** — No person shall be excused from attending and testifying or from producing documentary evidence before the director, the commission, or an appeals examiner, or in obedience to the subpoena of any of them, on the ground that the testimony or documentary evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce documentary evidence except that the individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. [1947, ch. 269, § 40, p. 793; am. 1949, ch. 144, § 40, p. 252; am. 1998, ch. 1, § 50, p. 3.]



### STATUTORY NOTES

**Compiler's Notes.** — The word "commission" was substituted for the word "board" on the authority of S.L. 1971, ch. 124, § 3, p. 422, compiled herein as § 72-502, which provided

that the references to the "industrial accident board" and "board" were deemed to be references to the "industrial commission."

### JUDICIAL DECISIONS

#### Application.

Since the records that the Department of Employment requires an employer to keep cannot be used against him in a criminal matter if he invokes the privilege in that matter as provided by this section, the report-

ing requirements of § 72-1337 do not violate his fifth amendment right against self-incrimination. *Hill v. State, Dep't of Emp.*, 108 Idaho 583, 701 P.2d 203 (1985).

**Cited in:** *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1963).

**72-1341. Federal-state cooperation.** — (1) The director shall cooperate with the United States department of labor, and is directed to take such action as may be necessary to secure to Idaho all advantages under federal laws providing for federal-state cooperation in the administration of unemployment insurance laws, the reduction or prevention of unemployment, and the full development of the workforce resources of this state. The director shall cooperate with the United States department of labor with regards to the receipt or expenditure by this state of moneys granted under any federal acts and shall comply with the requirements of the United States department of labor in preparing reports and ensuring the correctness of the reports.

(2) The director is authorized to make investigations, secure and transmit information, make available services and facilities and exercise other powers provided herein to facilitate the administration of any state or federal unemployment insurance or public employment service law. The director may utilize information, services and facilities made available to the state by any agency charged with the administration of an unemployment insurance or public employment service law. [1947, ch. 269, § 41, p. 793; am. 1949, ch. 144, § 41, p. 252; am. 1949, ch. 272, § 2, p. 551; am. 1951, ch. 104, § 9, p. 233; am. 1965, ch. 170, § 4, p. 331; am. 1969, ch. 170, § 2, p. 504; am. 1998, ch. 1, § 51, p. 3.]

### STATUTORY NOTES

**Effective Dates.** — Section 3 of S.L. 1969, ch. 170 declared an emergency. Approved March 18, 1969.

### JUDICIAL DECISIONS

#### Purpose.

In enacting the unemployment compensation statute, the intent and purpose was not to raise money for revenue purposes, but to raise money to do away with unemployment.

In re *Gem State Academy Bakery*, 70 Idaho 533, 224 P.2d 529 (1950).

**Cited in:** In re *Gem State Academy Bakery*, 70 Idaho 531, 224 P.2d 529 (1950).

## OPINIONS OF ATTORNEY GENERAL

The promulgation of IDAPA 09.30.055 by the director of the Department of Employment was a proper exercise of his authority

under subsection (b) of § 72-1333 [now § 67-4702] and subsection (a) of this section of the state Employment Security Law. OAG 84-11.

**72-1342. Disclosure of information.** — Information obtained from any employer or individual pursuant to the administration of this chapter, and determinations of the benefit rights of any individual shall be subject to disclosure as provided in chapter 3, title 9, Idaho Code, except that such information may be made available to public employees in the performance of their public duties subject to such restrictions and fees as the director may by rule prescribe. [1947, ch. 269, § 42, p. 793; am. 1949, ch. 144, § 42, p. 252; am. 1949, ch. 272, § 3, p. 551; am. 1951, ch. 104, § 10, p. 233; am. 1972, ch. 344, § 2, p. 998; am. 1977, ch. 179, § 11, p. 464; am. 1982, ch. 326, § 6, p. 807; am. 1990, ch. 213, § 109, p. 480; am. 1993, ch. 10, § 1, p. 30; am. 1998, ch. 1, § 52, p. 3.]

## STATUTORY NOTES

**Compiler's Notes.** — Section 1 of S.L. 1993, ch. 10, effective March 8, 1993, amended this section, as amended by S.L. 1990, ch. 213, § 109.

**Effective Dates.** — Section 111 of S.L.

1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**72-1343. Preservation and destruction of records.** — (1) The director may make such summaries or reproductions of records in his custody in whatever form for the effective and economical preservation of the information contained therein, and such summaries or reproductions, duly authenticated, shall be admissible in any proceeding under this chapter if the original records would have been admissible.

(2) The director may order the destruction or disposition of records in his custody if the preservation of such records is not necessary for the proper performance of his duties. [1947, ch. 269, § 43, p. 793; am. 1949, ch. 144, § 43, p. 252; am. 1951, ch. 104, § 11, p. 233; am. 1998, ch. 1, § 53, p. 3.]

**72-1344. Reciprocal arrangements and cooperation.** — (1) The director is authorized to enter into reciprocal arrangements with appropriate agencies of other states or of the federal government, or both, whereby:

(a) An employer of an individual who customarily provides services for the employer in more than one (1) state may elect to have the services deemed performed entirely in one (1) state if the state is one in which: (i) any part of the individual's services are performed, or (ii) the individual has his residence, or (iii) the employer maintains a place of business, provided the individual agrees with the election and the agency charged with the administration of such state's unemployment insurance law approves it;

(b) Potential rights to benefits accumulated under the unemployment insurance laws of the federal government may constitute the basis for the payment of benefits through a single appropriate agency under terms



which the director finds will be fair to all affected interests and will not result in a substantial loss to the employment security fund;

(c) The director shall participate in any wage combining plan that the secretary of labor may approve as provided in 26 U.S.C. 3304(a)(9)(B) of the federal unemployment tax act. Other arrangements outside the scope of the federal plan may be entered into if fair and reasonable provisions for reimbursement to the employment security fund for any benefits paid are included. Under such a plan, wages or services, upon the basis of which an individual may become entitled to benefits under an unemployment insurance law of another state or of the federal government, may be deemed to be wages for covered employment for the purpose of determining his rights to benefits under this chapter, and wages for covered employment, on the basis of which an individual may become entitled to benefits under this chapter, may be deemed to be wages or services on the basis of which unemployment insurance under the law of another state or of the federal government is payable; and

(d) Contributions due under this act with respect to wages for covered employment shall for the purposes of sections 72-1354 through 72-1364, Idaho Code, be deemed to have been paid to the employment security fund as of the date payment was made as contributions therefor under another state or federal unemployment insurance law. No such arrangement shall be entered into unless it contains provisions for reimbursement to the fund of such contributions as the director finds will be fair to all affected interests.

(2) Reimbursements paid from the employment security fund pursuant to paragraph (c) of subsection (1) of this section shall be deemed to be benefits for the purposes of this chapter. The director is authorized to make and receive reimbursements to and from other state or federal agencies in accordance with arrangements entered into pursuant to subsection (1) of this section.

(3) The director is authorized to enter into arrangements whereby facilities and services provided under this chapter and facilities and services provided under the unemployment insurance law of any foreign government may be utilized for taking claims and paying benefits. [1947, ch. 269, § 44, p. 793; am. 1949, ch. 144, § 44, p. 252; am. 1971, ch. 142, § 9, p. 595; am. 1998, ch. 1, § 54, p. 3.]

#### STATUTORY NOTES

**Federal References.** — Section 3304 of the federal unemployment tax act referred to in subsection (1)(c) is compiled as 26 U.S.C. § 3304.

#### JUDICIAL DECISIONS

**Cited in:** Booth v. City of Burley, 99 Idaho 229, 580 P.2d 75 (1978).

**72-1345. State employment service.** — A state employment service shall be operated as part of the department. The director shall establish and

maintain free public employment offices as may be necessary for the proper administration of this chapter, and for the purpose of performing the functions of the Wagner-Peyser Act, 29 U.S.C. 49. The provisions of said act are accepted by this state, and the department is designated the agency of this state for the purposes of said act. The department shall provide priority service for veterans in cooperation with the United States veterans employment service. [1947, ch. 269, § 45, p. 793; am. 1949, ch. 144, § 45, p. 252; am. 1949, ch. 272, § 4, p. 551; am. 1951, ch. 104, § 12, p. 233; am. 1998, ch. 1, § 55, p. 3.]

### STATUTORY NOTES

**Federal References.** — Act of Congress entitled "An Act to Provide for the Establishment of a National Employment System and for Cooperation with the States in the Promo-

tion of Such System, and for Other Purposes," approved June 6, 1933, referred to as the "Wagner-Peyser Act" referred to herein is compiled as 29 U.S.C. § 49(c).

### JUDICIAL DECISIONS

**Cited in:** Sheppard v. State, Dep't of Emp., 103 Idaho 501, 650 P.2d 643 (1982).

**72-1346. Employment security fund.** — (1) Establishment and Control. There is established in the state treasury, separate and apart from all other funds of this state, an "Employment Security Fund," which shall be perpetually appropriated to the director to be administered pursuant to the provisions of this chapter and the social security act. This fund shall consist of all contributions collected pursuant to this chapter, payments in lieu of contributions, interest earned upon any moneys in the fund, any property or securities acquired through the use of moneys belonging to the fund, all earnings of such property or securities, moneys temporarily deposited in the clearing account, and all other moneys received for the fund from any other source.

(2) Accounts and Deposits. The state controller shall maintain within the fund three (3) separate accounts: (i) a clearing account, (ii) an unemployment trust fund account, and (iii) a benefit account. Upon receipt by the director, all moneys payable to the fund shall be promptly forwarded to the state treasurer for immediate deposit in the clearing account. After clearance, all moneys in the clearing account shall, except as otherwise provided, be deposited promptly with the secretary of the treasury of the United States to the credit of this state's account in the federal unemployment trust fund established and maintained pursuant to section 904 of the social security act (42 U.S.C. 1104), any provisions of law in this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned for the payment of benefits from this state's account in the federal unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the state treasurer under the direction of the director in any depository bank in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. Moneys in the clearing and benefit accounts shall not be



commingled with other state funds and shall be maintained in separate accounts on the books of the depository bank. Such moneys shall be secured by the depository bank in the same manner as required by the general public depository law of this state and collateral pledged for this purpose shall be kept separate and distinct from collateral pledged to secure other funds of the state. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the employment security fund.

(3) Withdrawals. Moneys requisitioned by the director through the treasurer from this state's account in the federal unemployment trust fund shall be used exclusively for the payment of benefits and for refunds pursuant to section 72-1357, Idaho Code, except that Reed act moneys credited to this state's account pursuant to section 903 of the social security act (42 U.S.C. 1103), shall be used exclusively as provided in subsection (4) of this section. The director through the treasurer shall requisition from the federal unemployment trust fund such amounts, not exceeding the amounts standing to this state's account therein, as he deems necessary for the payment of benefits and refunds for a reasonable period. Upon receipt, such moneys shall be deposited in the benefit account. Expenditures of moneys in the benefit and clearing accounts shall not require the approval of the board of examiners or be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. The residual daily balance in the benefit account may be invested in accordance with the cash management improvement act of 1990, and earnings on those investments may be used to pay the related banking costs of maintaining the benefit account. Any earnings in excess of the related banking costs shall be returned to the state's account in the federal unemployment trust fund annually. All warrants issued for the payment of benefits and refunds shall bear the signature of the director. Upon agreement between the director and state controller, amounts in the benefit account may be transferred to a revolving account established and maintained in a depository bank from which the director may issue checks for the payment of benefits and refunds. Moneys so transferred shall be deposited subject to the same requirements as provided with respect to moneys in the clearing and benefit accounts in subsection (2) of this section. Any balance of moneys requisitioned from the federal unemployment trust fund which remains unclaimed or unpaid in the benefit account or revolving account after the expiration of the period for which such sums were requisitioned, may be utilized for the payment of benefits and refunds during succeeding periods, or, in the discretion of the director, shall be redeposited with the secretary of the treasury of the United States to the credit of this state's account in the federal unemployment trust fund.

(4) Reed Act Moneys. Reed act moneys credited to this state's account in the federal unemployment trust fund by the secretary of the treasury of the United States pursuant to section 903 of the social security act (42 U.S.C. 1103) may be requisitioned and used for the payment of benefits and for the payment of expenses incurred for the administration of this chapter. Moneys may only be requisitioned and used for the payment of expenses incurred for

the administration of this chapter if the expenses are incurred and the money is requisitioned after the enactment of a specific appropriation by the legislature which specifies the purposes for which such money is appropriated and the amounts appropriated therefor. Such appropriation is subject to the following conditions:

(a) Such money may not be obligated after the close of the two (2) year period which began on the date of the enactment of the appropriation law; and

(b) The amount which may be obligated at any time may not exceed the amount by which the aggregate of the amounts transferred to the account of this state pursuant to section 903 of the social security act (42 U.S.C. 1103) exceeds the aggregate of the amounts used by this state and charged against the amounts transferred to the account of this state. For the purposes of this subsection, amounts obligated for administrative purposes pursuant to an appropriation shall be chargeable against transferred amounts at the exact time the obligation is entered into.

(5) Reed act moneys requisitioned for the payment of benefits shall be deposited in the benefit account established in this section. Reed act moneys requisitioned for the payment of administrative expenses pursuant to a specific appropriation shall be deposited in the employment security administration fund, section 72-1347, Idaho Code, except that moneys appropriated for the purchase of lands and buildings shall be deposited in the state employment security administrative and reimbursement fund in accordance with section 72-1348, Idaho Code. Money so deposited shall, until expended, remain part of the employment security fund and, if not expended, shall be promptly returned to this state's account in the federal unemployment trust fund. [1947, ch. 269, § 46, p. 793; am. 1949, ch. 144, § 46, p. 252; am. 1957, ch. 157, § 1, p. 267; am. 1969, ch. 170, § 1, p. 504; am. 1971, ch. 136, § 50, p. 522; am. 1972, ch. 144, § 1, p. 311; am. 1976, ch. 207, § 3, p. 754; 1976, ch. 51, § 20, p. 152; am. 1983, ch. 146, § 2, p. 382; am. 1993, ch. 119, § 3, p. 297; am. 1994, ch. 180, § 238, p. 420; am. 1998, ch. 1, § 56, p. 3; am. 1999, ch. 101, § 1, p. 315; am. 2001, ch. 32, § 1, p. 48; am. 2004, ch. 24, § 2, p. 32.]

#### STATUTORY NOTES

**Cross References.** — Adjustment and re-funds, § 72-1357.

Service in the employ of the U. S. government, § 72-1316.

**Federal References.** — The cash management improvement act of 1990, referred to in subsection (3), is P.L. 101-453, codified as 31 U.S.C. § 6501 et seq.

**Effective Dates.** — Section 87 of S.L. 1971, ch. 136 declared an emergency. Approved March 18, 1971.

Section 2 of S.L. 1972, ch. 144 declared an emergency. Approved March 17, 1972.

Section 21 of S.L. 1976, ch. 51 provided that

the act should be in full force and effect on and after July 1, 1977.

Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on and after the first Monday of January, 1995, if the state board of canvassers has certified that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the state auditor to state controller." Since such amendment was adopted, the amendment to this section by S.L. 1994, ch. 180 became effective January 2, 1995.



## JUDICIAL DECISIONS

**Purpose of Act.**

The intent and purpose of the state government in enacting the Unemployment Compensation Statute was not to raise money for

revenue purposes, but to raise money to do away with unemployment. In re Gem State Academy Bakery, 70 Idaho 531, 224 P.2d 529 (1950).

## OPINIONS OF ATTORNEY GENERAL

The constitutional restrictions of fiscal management do not appear to affect participation in the delay of drawdown procedures

implemented under 5 U.S.C. § 301 and 31 C.F.R. part 205. OAG 83-6.

**72-1346A. Advances under title XII of the social security act to employment security fund — Federal Advance Interest Repayment Fund.** — (1) In the event the director determines that it is necessary to obtain advances from the federal unemployment account in the unemployment trust fund pursuant to title XII of the social security act (42 U.S.C. 1321), and that a request for such advances is authorized under section 1201 of the social security act, or under any other act of congress extending such authority, the director shall request the governor to make application to the secretary of labor of the United States for such advances.

(2) The governor is authorized to make application to the secretary of labor of the United States to obtain advances pursuant to title XII of the social security act (42 U.S.C. 1321 et seq.). Funds so advanced shall be for the payment of unemployment insurance benefits.

(3) Any amount transferred to the employment security fund by the secretary of the treasury of the United States in accordance with this section shall be repaid from the employment security fund as provided in section 1202 of the social security act (42 U.S.C. 1322).

(4) There is established in the state treasury the "Federal Advance Interest Repayment Fund." This fund shall consist of all moneys collected pursuant to subsection (5) of this section and interest earned upon any moneys in the fund. All moneys in the fund are perpetually appropriated to the director for the payment of interest on any advance made to this state pursuant to title XII of the social security act, except that if, at the end of any calendar year, all advances and interest have been repaid, any remaining balance in the fund shall be transferred to the employment security fund. Interest charges due and payable pursuant to section 1202 of the social security act, may be paid by the director from the federal advance interest repayment fund. Such expenditures shall not be subject to any law requiring specific appropriations or other formal release by state officers of money in their custody, nor shall such expenditures require the approval of the board of examiners.

(5) A federal advance interest repayment tax may be levied in accordance with the following provisions when required under paragraph (b) of this subsection:

(a) On the first day of the third month of a calendar quarter, the director shall:

(i) Estimate the interest payable on federal advances obtained under subsections (1) and (2) of this section;

- (ii) Estimate the amount of federal advance interest repayment tax receipts expected to be collected during the quarter for any preceding calendar quarter in which such tax was assessed;
  - (iii) Add the amount in the federal advance interest repayment fund on the last day of the immediately preceding calendar quarter to the estimate in paragraph (ii) of this subsection; and
  - (iv) Subtract the sum obtained in paragraph (iii) from the estimate in paragraph (i) of this subsection.
- (b) If the remainder obtained under paragraph (iv) of subsection (5)(a) of this section is more than zero, each covered employer subject to this section may, at the director's sole discretion, be assessed a federal advance interest repayment tax. Such tax shall be a percentage of the contributions payable under sections 72-1349 and 72-1350, Idaho Code, for the calendar quarter, but in no case shall be less than one dollar (\$1.00). The percentage shall be determined by dividing the remainder in paragraph (iv) of subsection (5)(a) of this section by the estimated amount of contributions due and payable on wages paid during the quarter. The percentage shall be rounded up to the next one-tenth of a percent (0.1%).
- (c) The tax assessed shall be collected and paid in accordance with such rules as the director may prescribe. All such taxes collected shall be deposited in the federal advance interest repayment fund. Any such tax imposed in a calendar quarter shall be paid on or before the last day of the second month following the close of such calendar quarter. An extension of time for payment may be granted for good cause in accordance with section 72-1349(4), Idaho Code.
- (d) If any covered employer fails to pay such tax on or before the date on which they are due, such tax shall bear penalty at a rate of five dollars (\$5.00) for each month or fraction thereof until paid; provided, that in no case shall the penalty exceed the actual amount of the tax due and payable. The date of payment shall be deemed the date of actual receipt by the director, or if mailed, the date of mailing. Penalties collected pursuant to this subsection shall be paid into the federal advance interest payment fund. Furthermore, if any employer becomes delinquent in making payment of the tax as required by this subsection, such employer shall be subject to the collection provisions in sections 72-1355 and 72-1360, Idaho Code.
- (e) A covered employer may make application to the director for a refund or credit of any amount erroneously paid as tax under this subsection. Such applications and the director's determinations regarding them shall be made in accordance with the provisions of section 72-1357, Idaho Code.
- (f) This section does not apply to covered employers eligible and electing the cost reimbursement payment method under section 72-1349A, Idaho Code. [I.C., § 72-1346A, as added by 1983, ch. 146, § 3, p. 382; am. 1998, ch. 1, § 57, p. 3; am. 2001, ch. 32, § 2, p. 48.]

#### STATUTORY NOTES

**Federal References.** — Sections 1201 and 1202 of the Social Security Act referred to in subsections (a) and (c) of this section are compiled as 42 U.S.C. §§ 1321, 1322.



**72-1347. Employment security administration fund.** — (1) There is established in the state treasury the “Employment Security Administration Fund.” All moneys deposited in said fund are perpetually appropriated to the director. Expenditures from the fund shall be in accordance with this chapter on the approval of the director and shall not require approval by the board of examiners, and shall not lapse at any time or be transferred to any other fund, except that the director may establish a revolving fund for the purpose of paying current cash items in connection with administrative expenses. All moneys in this fund which are received from the federal government shall be expended solely for the purposes and in the amounts found necessary by the secretary, United States department of labor, for the proper and efficient administration of this chapter. The fund shall consist of all moneys appropriated by this state to this fund, all moneys received from the United States for this fund, all moneys received from any other source for such purpose, and any moneys received from the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies. Such moneys shall be secured by the depository in which they are held as required by the general depository law of the state, chapter 1, title 57, Idaho Code, and collateral pledged shall be maintained in a separate custody account. The state treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the fund.

(2) Reimbursement of fund. If any moneys received from the United States department of labor under title III of the social security act, are found by the United States department of labor to have been lost or expended for purposes other than, or in amounts in excess of, those found necessary by the United States department of labor for the proper administration of this chapter, such moneys shall be replaced by moneys in the state employment security administrative and reimbursement fund as provided in section 72-1348, Idaho Code, but if the moneys therein are insufficient, the balance shall be replaced by moneys in the department of labor special administration fund, section 72-1347A(3), Idaho Code. [1947, ch. 269, § 47, p. 793; am. 1949, ch. 144, § 47, p. 252; am. 1976, ch. 141, § 3, p. 517; am. 1998, ch. 1, § 58, p. 3.]

#### STATUTORY NOTES

**Cross References.** — Liability of state treasurer, employment security fund, § 72-1346.

**Federal References.** — Social Security

Act, Title III, referred to in subsection (2) of this section, is compiled as 42 U.S.C. §§ 501-503.

**72-1347A. Employment security reserve fund — Special administration fund.** — (1) There is established in the state treasury a special trust fund, separate and apart from all other public funds of this state, to be known as the employment security reserve fund, hereinafter “reserve fund.”

Except as provided herein, all proceeds from the reserve tax defined in subsection (2) of this section shall be paid into the reserve fund. The moneys in the reserve fund may be used by the director for loans to the employment security fund, section 72-1346, Idaho Code, as security for loans from the federal unemployment insurance trust fund, and for the repayment of any interest bearing advances, including interest, made under title XII of the social security act, 42 USC 1321 through 1324, and shall be available to the director for expenditure in accordance with the provisions of this section. The state treasurer shall be the custodian of the reserve fund and shall invest said moneys in accordance with law. The state treasurer shall disburse the moneys from the reserve fund in accordance with the directions of the director.

(2) A reserve tax is imposed on all covered employers required to pay contributions pursuant to section 72-1350, Idaho Code, except deficit employers who have been assigned a taxable wage rate from deficit rate class six pursuant to section 72-1350(8)(a), Idaho Code. The reserve tax shall be due and payable at the same time and in the same manner as contributions. If the reserve fund is less than one percent (1%) of state taxable wages in the penultimate year as of September 30 of the preceding calendar year, the reserve tax rate for all eligible, standard-rated and deficit employers shall be equal to the taxable wage rate then in effect less the assigned contribution rate and training tax rate. The provisions of this chapter which apply to the payment and collection of contributions also apply to the payment and collection of the reserve tax, including the same calculations, assessments, method of payment, penalties, interest, costs, liens, injunctive relief, collection procedures and refund procedures. In the administration of the provisions of this section and the collection of the reserve tax, the director is granted all rights, authority, and prerogatives granted the director under the provisions of this chapter. Moneys collected from an employer delinquent in paying contributions and reserve taxes shall first be applied to pay any penalty and interest imposed pursuant to the provisions of this chapter and shall then be applied pro rata to pay delinquent contributions to the employment security fund, section 72-1346, Idaho Code, and delinquent reserve taxes to the reserve fund pursuant to this section. Any interest and penalties collected pursuant to this subsection shall be paid into the state employment security administrative and reimbursement fund, section 72-1348, Idaho Code, and any interest or penalties refunded under this subsection shall be paid out of that same fund. Reserve taxes paid pursuant to this subsection may not be deducted in whole or in part by any employer from the wages of individuals in its employ. All reserve taxes collected pursuant to this subsection shall be deposited in the clearing account of the employment security fund, section 72-1346, Idaho Code, for clearance only and shall not become part of such fund. After clearance, the moneys shall be deposited in the reserve fund established in subsection (1) of this section. No reserve tax shall be imposed for any calendar year if, as of September 30 of the preceding calendar year, the balance of the reserve fund equals or exceeds one percent (1%) of the state taxable wages for the penultimate calendar year, or exceeds forty-nine percent (49%) of the actual balance of



the employment security fund, section 72-1346, Idaho Code. Provided however, and notwithstanding any other provisions of this subsection, for calendar year 2006, the imposition of a reserve tax shall not be precluded even if the balance of the reserve fund exceeds forty-nine percent (49%) of the actual balance of the employment security fund.

(3) The interest earned from investment of the reserve fund shall be deposited in a fund established in the state treasurer's office, to be known as the department of commerce and labor special administration fund, hereinafter "special administration fund." The moneys in the special administration fund shall be held separate and apart from all other public funds of this state. The state treasurer shall be the custodian of this fund and may invest said moneys in accordance with law. Any interest earned on said moneys shall be deposited in the special administration fund. In the absence of a specific appropriation, the moneys in the special administration fund are perpetually appropriated to the director and may be expended with the approval of the advisory council appointed pursuant to section 72-1336, Idaho Code, for costs related to programs administered by the department. The director shall report annually to the joint finance-appropriations committee and the advisory council the expenditures and disbursements made from the fund during the preceding fiscal year, and the expenditures and disbursements and commitments made during the current fiscal year to date.

(4) Administrative costs related to the reserve fund and the special administration fund shall be paid from federal administrative grants received under title III of the social security act, to the extent permitted by federal law, and then from the special administration fund. [I.C., § 72-1347A, as added by 1991, ch. 119, § 5, p. 248; am. 1995, ch. 98, § 1, p. 289; am. 1996, ch. 415, § 2, p. 1378; am. 1998, ch. 1, § 59, p. 3; am. 2005, ch. 5, § 5, p. 6; am. 2006, ch. 48, § 1, p. 139.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 48, added "Provided however, and notwithstanding any other provisions of this subsection, for calendar year 2006, the imposition of a reserve tax shall not be precluded even if the balance of the reserve fund exceeds forty-nine percent (49%) of the actual balance of the employment security fund" at the end of subsection (2).

**Federal References.** — Title III of the Social Security Act, referred to in this section, is compiled as 42 U.S.C. § 501 et seq.

**Effective Dates.** — Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

Section 2 of S.L. 2006, ch. 48 declared an emergency retroactively to January 1, 2006 and approved March 14, 2006.

**72-1347B. Workforce development training fund.** — (1) There is established in the state treasury a special trust fund, separate and apart from all other public funds of this state, to be known as the workforce development training fund, hereinafter "training fund." Except as provided herein, all proceeds from the training tax defined in subsection (4) of this section shall be paid into the training fund. The state treasurer shall be the custodian of the training fund and shall invest said moneys in accordance with law. Any interest earned on the moneys in the training fund shall be deposited in the training fund. Moneys in the training fund shall be

disbursed in accordance with the directions of the director. In any month when the unencumbered balance in the training fund exceeds six million dollars (\$6,000,000), the excess amount over six million dollars (\$6,000,000) shall be transferred to the employment security reserve fund, section 72-1347A, Idaho Code. For the purposes of this subsection (1), the unencumbered balance in the training fund is the balance in such fund reduced by the sum of:

- (a) The amounts that have been obligated pursuant to fully-executed workforce development training fund contracts;
- (b) The amounts that have been obligated pursuant to letters of intent for proposed job training projects; and
- (c) Any administrative costs related to the training fund that are due and payable.

(2) All moneys in the training fund are perpetually appropriated to the director for expenditure in accordance with the provisions of this section. The purpose of the training fund is to provide or expand training and retraining opportunities in an expeditious manner that would not otherwise exist for Idaho's workforce. The training fund is intended to supplement, but not to supplant or compete with, money available through existing training programs. The moneys in the training fund shall be used for the following purposes:

- (a) To provide training for skills necessary for specific economic opportunities and industrial expansion initiatives;
- (b) To provide training to upgrade the skills of currently employed workers at risk of being permanently laid off;
- (c) For refunds of training taxes erroneously collected and deposited in the workforce training fund;
- (d) For all administrative expenses incurred by the department associated with the collection of the training tax and any other administrative expenses associated with the training fund.

(3) Expenditures from the training fund for purposes authorized in paragraphs (a) and (b) of subsection (2) of this section shall be approved by the director in consultation with the office of the governor, based on procedures, criteria and performance measures established by the council appointed pursuant to section 72-1336, Idaho Code. The activities funded by the training fund will be coordinated with similar activities funded by the state division of professional-technical education. Expenditures from the training fund for purposes authorized in paragraphs (c) and (d) of subsection (2) of this section shall be approved by the director. The director shall pay all approved expenditures as long as the training fund has a positive balance. The council shall report annually to the governor and the joint finance-appropriations committee the commitments and expenditures made from the training fund in the preceding fiscal year and the results of the activities funded by the training fund.

(4) A training tax is hereby imposed on all covered employers required to pay contributions pursuant to section 72-1350, Idaho Code, with the exception of deficit employers who have been assigned a taxable wage rate from rate class six pursuant to section 72-1350, Idaho Code. The training



tax rate shall be equal to three percent (3%) of the taxable wage rate then in effect for each eligible, standard-rated and deficit employer. The training tax shall be due and payable at the same time and in the same manner as contributions. This subsection is repealed effective January 1, 20012 [2012], unless, prior to that date, the Idaho legislature approves the continuation of this subsection by repeal of this sunset clause.

(5) The provisions of this chapter which apply to the payment and collection of contributions also apply to the payment and collection of the training tax, including the same calculations, assessments, method of payment, penalties, interest, costs, liens, injunctive relief, collection procedures and refund procedures. In the administration of the provisions of this section, the director is granted all rights, authority, and prerogatives granted under the provisions of this chapter. Moneys collected from an employer delinquent in paying contributions, reserve taxes and the training tax shall first be applied to any penalty and interest imposed pursuant to the provisions of this chapter and shall then be applied pro rata to delinquent contributions to the employment security fund, section 72-1346, Idaho Code, delinquent reserve taxes to the reserve fund, section 72-1347A, Idaho Code, and delinquent training taxes to the training fund. Any interest and penalties collected pursuant to this subsection shall be paid into the state employment security administrative and reimbursement fund, section 72-1348, Idaho Code, and any interest or penalties refunded under this subsection shall be paid out of that same fund. Training taxes paid pursuant to this section shall not be credited to the employer's experience rating account and may not be deducted by any employer from the wages of individuals in its employ. All training taxes shall be deposited in the clearing account of the employment security fund, section 72-1346, Idaho Code, for clearance only and shall not become part of such fund. After clearance, the moneys shall be deposited in the training fund established in subsection (1) of this section.

(6) Administrative costs related to the training fund shall be paid from the training fund in accordance with subsection (3) of this section. [I.C., § 72-1347B, as added by 1996, ch. 415, § 3, p. 1378; am. 1998, ch. 1, § 60, p. 3; am. 1999, ch. 329, § 41, p. 852; am. 2001, ch. 19, § 1, p. 24; am. 2004, ch. 346, § 12, p. 1029; am. 2005, ch. 5, § 6, p. 6; am. 2006, ch. 13, § 1, p. 31.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 13, substituted "January 1, 2012" for "January 1, 2007" in the last sentence of subsection (4).

**Effective Dates.** — Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

**72-1348. State employment security administrative and reimbursement fund.** — (1) There is created in the state treasury the "State Employment Security Administrative and Reimbursement Fund." Notwithstanding the provisions of sections 72-1346 and 72-1347, Idaho Code, the fund shall consist of:

(a) All penalties, and all interest on judgments or accounts secured by liens, collected pursuant to the provisions of sections 72-1347A, 72-1347B and 72-1354 through 72-1364, Idaho Code, but only after such interest and penalties have been deposited in the clearing account and are thereafter transferred to this fund in such amounts as, in the discretion of the director, will leave a sufficient balance of interest and penalties in the clearing account to pay refunds; and

(b) Reed act moneys appropriated for the purchase of land and buildings pursuant to section 72-1346(5), Idaho Code.

(2) Moneys referred to in subsection (1)(a) of this section are perpetually appropriated to the director and may be used upon written authorization of the board of examiners for any lawful purpose, including, but not limited to:

(a) As a revolving fund to cover expenditures for which federal funds have been duly requested but not yet received, subject to reimbursement upon receipt of the federal funds;

(b) For the payment of costs of administration including costs not validly chargeable against federal grants;

(c) For the payment of refunds of penalties pursuant to section 72-1357, Idaho Code; and

(d) For the purchase of land and buildings for the purpose of providing office space for the department.

(3) Moneys referred to in subsection (1) (b) of this section may be used by the department to acquire for and in the name of the state by term purchase agreement lands and buildings for office space for the department at such places as the director finds necessary. An agreement made for the purchase of premises pursuant to this subsection shall be subject to the approval of the attorney general as to form and title.

Premises purchased pursuant to this section shall be used for the department, or if it is desirable to move the department, similar space will be furnished by the state to the department without further payment therefor by the United States. [1947, ch. 269, § 48, p. 793; am. 1949, ch. 144, § 48, p. 252; am. 1951, ch. 235, § 3, p. 472; am. 1957, ch. 157, § 2, p. 267; am. 1998, ch. 1, § 61, p. 3; am. 2004, ch. 24, § 3, p. 32.]

#### STATUTORY NOTES

**Cross References.** — Adjustment and re- ch. 157 declared an emergency. Approved  
funds, § 72-1357. March 9, 1957.

**Effective Dates.** — Section 3 of S.L. 1957,

**72-1349. Payment of contributions.** — (1) Contributions shall be paid on taxable wages for each calendar year equal to the amount determined in accordance with section 72-1350, Idaho Code. Contributions on wages paid to an individual under another state unemployment insurance law, or paid by an employer's predecessor during the calendar year, shall be counted in complying with this provision.

(2) Contributions shall accrue and become payable by each covered employer for each calendar quarter with respect to wages for covered employment. Such contributions shall become due and be paid by each



covered employer to the director for the employment security fund and shall not be deducted from the wages of individuals employed by such employer. All moneys required to be paid by a covered employer pursuant to this chapter shall immediately, upon becoming due and payable, become or be deemed money belonging to the state, and every covered employer shall hold or be deemed to hold said money separately, aside, or in trust from any other funds, moneys or accounts, for the state of Idaho for payment in the manner and at the times provided by law.

(3) The contributions payable by each covered employer, with respect to covered employment, accruing in each calendar quarter, shall be paid on or before the last day of the month following the close of said calendar quarter.

(4) The director may, for good cause shown by a covered employer, extend the time for payment of his contributions or any part thereof, but no such extension of time shall postpone the due date more than sixty (60) days. Contributions with respect to which an extension of time for payment has been granted shall be paid on or before the last day of the period of the extension.

(5) Whenever it appears to be essential to the proper administration of this chapter that collection of the contributions of a covered employer must be made more often than quarterly, the director shall have authority to demand payment of the contributions forthwith.

(6) In accordance with rules the director may prescribe, any person or persons entering into a formal contract with the state, any county, city, town, school or irrigation district, or any quasi public corporation of the state, for the construction, alteration, or repair of any public building or public work, the contract price of which exceeds the sum of one thousand dollars (\$1,000) may be required before commencing such work, to execute a surety bond in an amount sufficient to cover contributions when due. If the director, who shall approve said bond, determines that said bond has become insufficient, he may require that a new bond be provided in the amount he directs. Failure on the part of the employer covered by the bond to pay the full amount of his contributions when due shall render the surety liable on said bond as though the surety was the employer and subject to the other provisions of this chapter.

(7) In the payment of any contributions a fractional part of a dollar shall be disregarded unless it amounts to fifty cents (50¢) or more, in which case it shall be increased to one dollar (\$1.00). [1947, ch. 269, § 49, p. 793; am. 1949, ch. 144, § 49, p. 252; am. 1951, ch. 104, § 13, p. 233; am. 1959, ch. 32, § 1, p. 68; am. 1971, ch. 142, § 10, p. 595; am. 1972, ch. 344, § 3, p. 998; am. 1975, ch. 126, § 3, p. 259; am. 1976, ch. 141, § 4, p. 517; am. 1976, ch. 207, § 4, p. 754; am. 1977, ch. 179, § 12, p. 464; am. 1998, ch. 1, § 62, p. 3; am. 2005, ch. 5, § 7, p. 6.]

#### STATUTORY NOTES

**Effective Dates.** — Section 17 of S.L. 2005, ch. 5 declared an emergency retroactively to January 1, 2005.

## JUDICIAL DECISIONS

**Overpayments.**

Prior to the 1976 amendment, cost reimbursement employers were not obligated to compensate the employment security fund for overpayment. *Department of Emp. v. St. Alphonsus Hosp.*, 98 Idaho 283, 561 P.2d 1316 (1977).

**Cited in:** *In re Potlatch Forests, Inc.*, 72

Idaho 291, 240 P.2d 242; *In re Central Eureka Corp.*, 76 Idaho 287, 281 P.2d 665 (1955); *Department of Emp. v. St. Alphonsus Hosp.*, 96 Idaho 470, 531 P.2d 232 (1975); *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975); *Department of Emp. v. Kasum Communications*, 97 Idaho 372, 544 P.2d 1142 (1976).

**72-1349A. Financing of benefit payments by nonprofit organizations and governmental entities.** — (1) Benefits paid to employees of governmental entities and nonprofit organizations shall be financed in accordance with the provisions of this section.

A group of such organizations or entities may elect, with the approval of the director, to act as a group in fulfilling the requirements of this chapter.

(2) Liability for contributions and election of reimbursements. A nonprofit organization or governmental entity shall pay contributions under the provisions of section 72-1349, Idaho Code, unless it elects, in accordance with this section to pay to the director an amount equal to the full amount of regular benefits paid and the amount paid for extended benefits for which the department is not reimbursed by the federal government, for any reason including, but not limited to, payments made as a result of a determination or payments erroneously paid or paid as a result of a determination of eligibility which is subsequently reversed if said payment or any portion thereof was made as a result of wages earned in the employ of such organization or entity. Any sums recovered by the department from a claimant as a result of said payments shall be credited to the account of the nonprofit organization or governmental entity which reimbursed the fund for the payment of said benefits. Where such benefits are paid utilizing wages paid by two (2) or more employers, the portion of benefits to be repaid by the organization or entity shall be its proportionate share. This shall be computed on the basis of the relationship between wages utilized which were earned for services performed for such organization or entity and the total wages utilized in paying such benefits.

(3) Any nonprofit organization or governmental entity may elect to become liable for payments in lieu of contributions, provided it files with the director a written notice of election not later than thirty (30) days prior to the beginning of any taxable year or within thirty (30) days after the date of the final determination that such organization or entity is subject to this chapter. Such election shall be effective for not less than two (2) full taxable years after the election is made, and will continue to be in effect until terminated. The organization or entity must file with the director a written notice of termination of such election not later than thirty (30) days prior to the beginning of the taxable year for which such termination shall first be effective. The director may, in his discretion, terminate an election as provided in this section or extend the period within which a notice of election or a notice of termination must be filed. The director shall notify each nonprofit organization and governmental entity of any determination he



makes of its status as an employer and of the effective date of any election which it makes and of any termination of such election.

(4) Reimbursement payments. Payments in lieu of contributions shall be made in accordance with the provisions of this subsection, including either paragraph (a) or paragraph (b).

(a) At the end of each calendar quarter, or at the end of any other period as determined by the director, the director shall bill each organization or entity (or group of organizations or entities) which has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits paid, and the amount paid for extended benefits for which the department is not reimbursed by the federal government, if paid as a result of wages earned in the employ of such organization or entity.

(b) Payment in advance. Nonprofit organizations or governmental entities may elect to make payments in lieu of contributions in advance of actual billing for payment costs. Advance payments shall be made as follows: At the end of each calendar quarter, the nonprofit organization or governmental entity shall pay one percent (1%) of its total quarterly payroll unless the director determines that a lesser percentage will cover the cost of payment of benefits to the employees of said employer. For purposes of this section, the total quarterly payroll for school districts shall be computed based upon only those school districts which have elected cost reimbursement status. Such payments shall become due and payable within thirty (30) days following the quarter ending.

At the end of such taxable year, the director shall compute the benefit costs attributable to the employer as provided in subsection (2) of this section. The director will then debit the employer's account with these costs. When payments exceed benefit costs, either the employer will be credited on subsequent benefit costs with the overpayment or, at the director's discretion, the overpayment will be refunded to the employer. When payments are not sufficient to pay benefit costs, either the employer will be billed the additional amount necessary to pay such costs or, at the director's discretion, the employer's advance payment rate for the next taxable year will be set at a rate that will cover such costs.

(5) Bond requirements. Any nonprofit organization that elects to become liable for payments in lieu of contributions may be required to obtain and deposit with the director a surety bond approved by the director. The amount of the bond shall be determined by the director on the basis of potential liability for benefit costs of each employing nonprofit organization. Such bond shall be in force for a period of not less than two (2) years, and shall be renewed not less frequently than two (2) year intervals for as long as the organization continues to be liable for payments in lieu of contributions. The director shall require adjustments to be made in the bond filed as deemed appropriate. When upward adjustments are required, the adjusted bond shall be filed within thirty (30) days of the date notice of the required adjustment was mailed. Failure by an organization covered by such bond to pay the full amount of payments due, together with interest and penalties, as provided in section 72-1354, Idaho Code, shall render the surety liable on

said bond to the extent of the bond, as though the surety was a liable organization.

(6) Failure to pay timely. If any nonprofit organization or governmental entity is delinquent in making payments in lieu of contributions, the director may terminate such employer's election to make payments in lieu of contributions as of the beginning of the next taxable year, and such termination shall be effective for that and the next taxable year. Any nonprofit organization or governmental entity becoming delinquent in making payments in lieu of contributions shall be subject to the same penalty provisions as any other covered employer as provided in this chapter.

(7) Appeals procedure. Nonprofit organizations and governmental entities making payments in lieu of contributions may appeal a determination made pursuant to this section as provided in section 72-1361, Idaho Code.

(8) In the payment of any payments in lieu of contributions a fractional part of a dollar shall be disregarded unless it amounts to fifty cents (50¢) or more, in which case it shall be increased to one dollar (\$1.00). [I.C., § 72-1349A, as added by 1977, ch. 179, § 13, p. 464; am. 1978, ch. 112, § 6, p. 232; am. 1980, ch. 264, § 4, p. 682; am. 1982, ch. 326, § 7, p. 807; am. 1998, ch. 1, § 63, p. 3; am. 2006, ch. 38, § 1, p. 105.]

## STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 38, in the second paragraph of subsection (4)(b), inserted "either" following "benefit costs," twice, inserted "or, at the director's discretion, the overpayment will be refunded to the employer" at the end of the third sentence, and inserted "or, at the director's discretion, the employer's advance payment rate for the next taxable year will be set at a

rate that will cover such costs" at the end of the fourth sentence.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 5 of S.L. 2006, ch. 38 declared an emergency. Approved March 11, 2006.

## JUDICIAL DECISIONS

### ANALYSIS

Erroneous payments.  
Liability of employer.

### Erroneous Payments.

Under this section, if benefits were erroneously or incorrectly paid to a claimant, the cost-reimbursement employer would be entitled to credit to his account for any sums recovered by the department from the benefit claimant. *Tendoy Area Council v. State, Dep't of Emp.*, 105 Idaho 517, 670 P.2d 1302 (1983).

### Liability of Employer.

Regardless of the determination of a claimant's eligibility, a cost-reimbursement employer is liable for the benefits paid to a claimant as a result of the wages paid by the employer during the claimant's base period.

*Tendoy Area Council v. State, Dep't of Emp.*, 105 Idaho 517, 670 P.2d 1302 (1983).

Employer was properly billed for unemployment benefits paid to one of its former employees where, by election, employer was a cost-reimbursement employer under this section and did not argue that the claimant was not its former employee or that the claimant's base period for determining benefits did not include former employment by such employer. *Tendoy Area Council v. State, Dep't of Emp.*, 105 Idaho 517, 670 P.2d 1302 (1983).

**Cited in:** *Tendoy Area Council v. State Dep't of Emp.*, 108 Idaho 441, 700 P.2d 63 (1985).



**72-1349B. Financing of benefits payments by professional employers and their clients.** — (1) Nonprofit organizations and governmental entities excepted. Financing of benefits for workers assigned by a professional employer to a nonprofit organization or a governmental entity shall be paid as provided in section 72-1349A, Idaho Code. Financing of benefits for workers assigned by a professional employer to any entity other than a nonprofit organization or governmental entity shall be made in accordance with the provisions of this section.

(2) Liability for contributions. Unless a professional employer meets the minimum requirements of this chapter, its client shall remain liable as a covered employer for any payments due under the provisions of this chapter. During the term of a professional employer arrangement, a professional employer is liable for the payment of all moneys due pursuant to this chapter as a result of wages paid to employees assigned to a client company, except compensation paid to sole proprietors or partners in the client company.

(3) Joint and several liability. A client is jointly and severally liable for any unpaid moneys due under the provisions of this chapter from the professional employer for wages paid to workers assigned to the client.

(4) Reporting requirements. The professional employer shall report and make all payments under its state employer account number. The professional employer shall keep separate records and submit separate quarterly wage reports for each of its clients. The professional employer shall pay contributions for its clients collectively using the professional employer's contribution rate unless it elects to pay the contribution for certain clients individually in which instance the contribution shall be paid using the individual client's contribution rate.

(5) Interested party. As between a professional employer and its client, the professional employer company shall be deemed to be the interested party for purposes of section 72-1323, Idaho Code, and all proceedings to determine rights to benefits under the provisions of this chapter.

(6) Temporary workers. The provisions of this section do not apply to an entity that provides temporary workers on a temporary help basis, provided that the entity is liable as the employer for all payments due under the provisions of this chapter as a result of wages paid to those temporary workers.

(7) Rebuttable presumption. When a professional employer assigns workers to only one (1) client and its affiliates, there is a rebuttable presumption that the client entered into a professional employer arrangement to avoid calculation of the proper taxable wage rate. If the professional employer fails to rebut this presumption, the director, pursuant to section 72-1353, Idaho Code, shall issue an administrative determination of coverage holding the client to be the covered employer for purposes of this chapter.

(8) A client ceasing to pay wages. Whenever a client ceases to pay wages, such client shall be subject to termination of its employer account and experience rating records in the same manner as any other employer, in accordance with the provisions of sections 72-1351 and 72-1352, Idaho Code. If a client which has ceased to pay wages subsequently becomes subject to

this chapter because it resumes paying wages, it will be assigned the appropriate experience rate in accordance with the provisions of section 72-1351, Idaho Code.

(9) Succession of experience factors. Whenever a professional employer arrangement is entered, the separate account and experience factors of payroll and reserve shall be transferred to the professional employer for the purpose of determining the professional employer's contribution rate to be paid on behalf of the client. Upon the expiration or termination of the professional employer arrangement, so much of the professional employer's separate account and experience factors of payroll and reserve as is attributable to the client shall be transferred to the terminating client for the purpose of determining the client's subsequent rate of contribution. In the event the professional employer elects to pay the client's contribution separately as provided in subsection (4) of this section, then the client's experience factors of payroll and reserve shall remain with the client employer for the duration of the professional employer arrangement. [I.C., § 72-1349D, as added by 1994, ch. 129, § 2, p. 287; am. 1997, ch. 104, § 1, p. 245; am. and redesi. 1998, ch. 1, § 65, p. 3.]

#### STATUTORY NOTES

**Prior Laws.** — Former section 72-1349B, which comprised I.C., § 72-1349B, as added by 1977, ch. 179, § 14, p. 464; am. 1978, ch. 112, § 7, p. 232; am. 1982, ch. 326, § 8, p. 807,

was repealed by S.L. 1998, ch. 1, § 64, effective July 1, 1998.

**Compiler's Notes.** — This section was formerly compiled as § 72-1349D.

**72-1349C. Treatment of Indian tribes.** — (1) In addition to the definition provided in section 72-1315, Idaho Code, the term "covered employer" shall also include any Indian tribe for which service in covered employment is performed.

(2) In addition to the definition provided in section 72-1316, Idaho Code, the term "covered employment" shall also include service performed in the employ of an Indian tribe as defined in section 3306(u) of the federal unemployment tax act (FUTA), provided such service is excluded from "employment" as defined in FUTA solely by reason of section 3306(c)(7), FUTA, and is not otherwise excluded from covered employment under this chapter. For purposes of this section, the exemptions from covered employment in sections 72-1316A(5) and (9), Idaho Code, shall be applicable to services performed in the employ of an Indian tribe.

(3) Benefits based on service in covered employment as that term is defined in this section, shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service under this chapter.

(4) Indian tribes, or tribal units meaning subdivisions, subsidiaries or business enterprises wholly owned by such Indian tribe, subject to this chapter shall pay contributions under the same terms and conditions as all other covered employers unless the tribe elects to pay into the state unemployment fund amounts equal to the amount of benefits attributable to service in the employ of the Indian tribe.



(a) Indian tribes electing to make payments in lieu of contributions shall make such election in the same manner and under the same conditions as provided in section 72-1349A, Idaho Code, pertaining to nonprofit organizations and governmental entities subject to this chapter. Indian tribes shall determine if reimbursement for benefits paid will be elected by the tribe as a whole, by individual tribal units, or by combinations of individual tribal units.

(b) Indian tribes or tribal units shall be billed for the full amount of benefits attributable to service in the employ of the Indian tribe or tribal unit on the same basis as other employing units that have elected to make payments in lieu of contributions.

(c) At the discretion of the director, any Indian tribe or tribal unit that elects to become liable for payments in lieu of contributions may be required to obtain and deposit with the director a surety bond approved by the director. The amount of the bond shall be determined by the director based on the employing entity's potential liability for benefit costs. Such bond shall be in force for a period of not less than two (2) years, and shall be renewed not less frequently than two (2) year intervals for as long as the Indian tribe or tribal unit continues to be liable for payments in lieu of contributions. The director may require adjustments to be made in the bond filed. When upward adjustments are required, the adjusted bond shall be filed within thirty (30) days of the date notice of the required adjustment was mailed. Failure by an Indian tribe or tribal unit covered by such bond to pay the full amount of payments due, together with interest and penalties as provided in section 72-1354, Idaho Code, shall render the surety liable on said bond to the extent of the bond, as though the surety was a liable organization.

(5) Failure of the Indian tribe or tribal unit to make required payments, including assessments of interest and penalty, within ninety (90) days of receipt of the bill shall cause the Indian tribe to lose the option to make payments in lieu of contributions as described in subsection (4) of this section, for the following tax year unless payment in full is received before contribution rates for the next tax year are computed.

(a) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment as described in this subsection (5) of this section, shall have such option reinstated if, after a period of one (1) year, all contributions have been made timely, provided no contributions, payments in lieu of contributions for benefits paid, penalties or interest remain outstanding.

(b) Failure of the Indian tribe or any tribal unit thereof to make required payments, including assessments of interest and penalty, after all collection activities deemed necessary by the director have been exhausted, shall cause services performed for such tribe to not be treated as "covered employment" for purposes of subsection (2) of this section.

(c) The director may determine that any Indian tribe that loses coverage under paragraph (b) of this subsection, may have services performed for such tribe again included as "covered employment" for purposes of subsection (2) of this section, if all contributions, payments in lieu of contributions, penalties and interest have been paid.

(6) Notices of payment and reporting delinquency to Indian tribes and their tribal units shall include information that failure to make full payment within the prescribed time frame:

- (a) Shall cause the Indian tribe to be liable for taxes under the federal unemployment tax act;
- (b) Shall cause the Indian tribe to lose the option to make payments in lieu of contributions; and
- (c) Could cause the Indian tribe to be excepted from the definition of "covered employer" as provided in subsection (1) of this section, and services in the employ of the Indian tribe as provided in subsection (2) of this section, to be excepted from "covered employment."

(7) An Indian tribe and its tribal units shall be jointly and severally liable for all payments due under this chapter, including assessments of interest and penalties.

(8) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the federal government shall be financed in their entirety by such Indian tribe or tribal unit.

(9) If an Indian tribe fails to make payments required under this section, including assessments of interest and penalty, within ninety (90) days of a final notice of delinquency, or fails to timely file a required bond, the director shall immediately notify the United States internal revenue service and the United States department of labor. [I.C., § 72-1349C, as added by 2002, ch. 45, § 1, p. 99.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-1349C, which comprised I.C., § 72-1349C, as added by 1977, ch. 174, § 1, p. 448; am. 1978, ch. 112, § 8, p. 232; am. 1984, ch. 180, § 7, p. 426, was repealed by S.L. 1998, ch. 1, § 64, effective July 1, 1998.

**Federal References.** — Section 3306 of

the Federal Unemployment Tax Act, referred to in this section, is compiled as 26 U.S.C.S. § 3306; the entire Act is compiled as 26 U.S.C.S. §§ 3301 - 3311.

**Effective Dates.** — Section 2 of S.L. 2002, ch. 45 declared an emergency. Approved February 26, 2002.

#### 72-1349D. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1349D was amended and redesignated as § 72-1349B by § 65 of S.L. 1998, ch. 1.

**72-1350. Taxable wage base and taxable wage rates.** — (1) All remuneration for personal services as defined in section 72-1328, Idaho Code, equal to the average annual wage in covered employment for the penultimate calendar year, rounded to the nearest multiple of one hundred dollars (\$100), or the amount of taxable wage base specified in the federal unemployment tax act, whichever is higher, shall be the taxable wage base for purposes of this chapter.

(2) Prior to December 31 of each year, the director shall determine the taxable wage rates for the following calendar year for all covered employers,



except cost reimbursement employers, in accordance with this section, provided however, and notwithstanding any other provision of the employment security law to the contrary, for calendar years 2005 and 2006, the taxable wage rates for all covered employers except cost reimbursement employers shall be determined as follows:

(a) For calendar year 2005, the taxable wage rate shall be determined using a base tax rate of one and fifty hundredths percent (1.50%);

(b) For calendar year 2006, the taxable wage rate shall be determined using a base tax rate of one and sixty-seven hundredths percent (1.67%) unless, at any time prior to September 30, 2005, the actual balance in the employment security fund, section 72-1346, Idaho Code, is fifty percent (50%) or less than the actual balance in the reserve fund, section 72-1347A, Idaho Code, in which case the taxable wage rate shall be determined using a base tax rate calculated in accordance with subsection (5) of this section.

(3) An average high cost ratio shall be determined by calculating the average of the three (3) highest benefit cost rates in the twenty (20) year period ending with the preceding year. For the purposes of this section, the "benefit cost rate" is the total annual benefits paid, including the state's share of extended benefits but excluding the federal share of extended benefits and cost reimbursable benefits, divided by the total annual covered wages excluding cost reimbursable wages. The resulting average high cost ratio is multiplied by the desired fund size multiplier of eight-tenths (0.8), and the result, for the purposes of this section, is referred to as the "average high cost multiple" (AHCM).

(4) The fund balance ratio shall be determined by dividing the actual balance of the employment security fund, section 72-1346, Idaho Code, and the reserve fund, section 72-1347A, Idaho Code, on September 30 of the current calendar year by the wages paid by all covered employers in Idaho, except cost reimbursement employers, in the preceding calendar year.

(5) The base tax rate shall be determined as follows:

(a) Divide the fund balance ratio by the AHCM;

(b) Subtract the quotient obtained from the calculation in paragraph (5)(a) of this section from the number two (2);

(c) Multiply the remainder obtained from the calculation in paragraph (5)(b) of this section by two and one-tenth percent (2.1%). The product obtained from this calculation shall equal the base tax rate, provided however, that the base tax rate shall not be less than sixty-three hundredths percent (0.63%) and shall not exceed three and thirty-six hundredths percent (3.36%).

(6) The base tax rate calculated in accordance with subsection (5) of this section shall be used to determine the taxable wage rate effective the following calendar year for all covered employers except cost reimbursement employers as provided in subsections (7) and (8) of this section.

(7) Table of Rate Classes, Tax Factors and Minimum and Maximum Taxable Wage Rates

Cumulative Taxable Payroll Limits				Eligible Employers	
Rate Class	More Than (% of Taxable Payroll)	Equal to or Less Than (% of Taxable Payroll)	Tax Factor	Minimum Taxable Wage Rate	Maximum Taxable Wage Rate
1	—	12	0.2857	0.180%	0.960%
2	12	24	0.4762	0.300%	1.600%
3	24	36	0.5714	0.360%	1.920%
4	36	48	0.6667	0.420%	2.240%
5	48	60	0.7619	0.480%	2.560%
6	60	72	0.8571	0.540%	2.880%
7	72	—	0.9524	0.600%	3.200%

Standard-Rated Employers		
Tax Factor	Minimum Taxable Wage Rate	Maximum Taxable Wage Rate
1.000	1.000%	3.360%

Cumulative Taxable Payroll Limits				Deficit Employers	
Rate Class	More Than (% of Taxable Payroll)	Equal to or Less Than (% of Taxable Payroll)	Tax Factor	Minimum Taxable Wage Rate	Maximum Taxable Wage Rate
-1	—	30	1.7143	1.080%	4.800%
-2	30	50	1.9048	1.200%	5.200%
-3	50	65	2.0952	1.320%	5.600%
-4	65	80	2.2857	1.440%	6.000%
-5	80	95	2.6667	1.680%	6.400%
-6	95	—	2.6667	5.400%	6.800%

(8) Each covered employer, except cost reimbursement employers, will be assigned a taxable wage rate and a contribution rate as follows:

(a) Each employer, except standard-rated employers, will be assigned to one (1) of the rate classes for eligible and deficit employers provided in subsection (7) of this section based upon the employer's experience as determined under the provisions of sections 72-1319, 72-1319A, 72-1351 and 72-1351A, Idaho Code.

(b) For each rate class provided in subsection (7) of this section, the department will multiply the base tax rate determined in accordance with subsection (5) of this section by the tax factor listed for that rate class in the table provided in subsection (7) of this section. The product obtained from this calculation shall be the taxable wage rate for employers assigned to that rate class, provided however, that the taxable wage rate shall not be less than the minimum taxable wage rate assigned to that rate class and shall not exceed the maximum taxable wage rate assigned to that rate class in the table provided in subsection (7) of this section.

(c) For standard-rated employers, the department will multiply the base tax rate determined in accordance with subsection (5) of this section by the tax factor listed for standard-rated employers in the table provided in subsection (7) of this section. The product obtained from this calculation shall be the taxable wage rate for standard-rated employers, provided



however, that the taxable wage rate shall not be less than the minimum taxable wage rate assigned to standard-rated employers and shall not exceed the maximum taxable wage rate assigned to standard-rated employers in the table provided in subsection (7) of this section.

(d) Deficit employers who have been assigned a taxable wage rate from deficit rate class six will be assigned contribution rates equal to their taxable wage rate.

(e) All other eligible, standard-rated and deficit employers will be assigned contribution rates equal to ninety-seven percent (97%) of their taxable wage rate. Provided however, that for each calendar year a reserve tax is imposed pursuant to section 72-1347A, Idaho Code, the contribution rates for employers assigned contribution rates pursuant to this paragraph shall be eighty percent (80%) of their taxable wage rate.

(9) Each employer shall be notified of his taxable wage rate as determined for any calendar year pursuant to this section and section 72-1351, Idaho Code. Such determination shall become conclusive and binding upon the employer, unless within fourteen (14) days after delivery or mailing of the notice thereof to his last known address, the employer files an application for redetermination, setting forth his reasons therefor. Reconsideration shall be limited to transactions occurring subsequent to any previous determination which has become final. The employer shall be promptly notified of the redetermination, which shall become final unless an appeal is filed within fourteen (14) days after delivery or mailing of notice to his last known address. Proceedings on the appeal shall be in accordance with the provisions of section 72-1361, Idaho Code. [I.C., § 72-1350, as added by 1983, ch. 146, § 5, p. 382; am. 1985, ch. 203, § 1, p. 506; am. 1986, ch. 23, § 1, p. 68; am. 1987, ch. 317, § 1, p. 666; am. 1989, ch. 55, § 1, p. 78; am. 1989, ch. 198, § 1, p. 496; am. 1991, ch. 119, § 6, p. 248; am. 1995, ch. 98, § 2, p. 289; am. 1996, ch. 415, § 4, p. 1378; am. 1997, ch. 271, § 1, p. 786; am. 1998, ch. 1, § 66, p. 3; am. 1999, ch. 101, § 2, p. 315; am. 2001, ch. 18, § 1, p. 21; am. 2003, ch. 2, § 1, p. 3; am. 2005, ch. 5, § 8, p. 6.]

### STATUTORY NOTES

**Prior Laws.** — Former § 72-1350 which comprised I.C., 72-1350, as added by 1975, ch. 126, § 5, p. 259, was repealed by S.L. 1983, ch. 146, § 4, effective April 1, 1983.

**Amendments.** — This section was amended by Section 66 of S.L. 1998, ch. 1, effective retroactively to January 1, 1998. In subsection (7), the previous taxable wage rate of 5.6 under Schedule VIII for deficit employers in rate class 3 was overstruck, and the new taxable wage rate of 5.4 was simultaneously underscored and overstruck. Also in subsection (7), the previous taxable wage rate of 6.0 under Schedule IX for deficit employers in rate class 3 was overstruck and the new taxable wage rate of 5.6 was simultaneously underscored and overstruck. Because these new tax rates were simultaneously under-

scored and overstruck, they are not included in this section.

**Federal References.** — The federal unemployment tax act, referred to in subsection (1), is codified as 26 U.S.C. § 3301 et seq.

**Effective Dates.** — Section 3 of S.L. 1987, ch. 317 read: "An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 1987. Section 2 of this act shall be in full force and effect on and after July 1, 1987."

Section 2 of S.L. 1989, ch. 55 declared an emergency and provided that the act should become effective retroactively to January 1, 1989.

Section 2 of S.L. 1989, ch. 198 declared an emergency and provided that the act should

become effective retroactively to January 1, 1989.

Section 5 of S.L. 1996, ch. 415 declared an emergency and provided that the act should be in full force and effect on and after its passage and approval, retroactive to January 1, 1996. Approved March 20, 1996.

Section 5 of S.L. 1997, ch. 271 declared an emergency and provided that § 1 should be in full force and effect on after its passage and approval retroactive to January 1, 1997 and that §§ 2, 3, and 4 should be in full force and effect on and after July 1, 1997.

S.L. 1998, ch. 1, § 109 provided: "An emergency existing therefor, which emergency is hereby declared to exist, Section 66 of this act [this section] shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 1998." Approved February 4, 1998.

Section 2 of S.L. 2003, ch. 2 declared an emergency retroactively to January 1, 2003 and approved February 4, 2003.

Section 17 of S.L. 2005, ch. 5 declared an emergency retroactively to January 1, 2005.

**72-1351. Experience rating.** — (1) Subject to the other provisions of this chapter, each eligible and deficit employer's (except cost reimbursement employers) taxable wage rate shall be determined in the manner set forth below for each calendar year:

(a)(i) Each eligible employer shall be given an "experience factor" which shall be the ratio of excess of contributions over benefits paid on the employer's account since December 31, 1939, to his average annual taxable payroll rounded to the next lower dollar amount for the four (4) fiscal years immediately preceding the computation date, except that when an employer first becomes eligible, his "experience factor" will be computed on his average annual taxable payroll for the two (2) fiscal years or more, but not to exceed four (4) fiscal years, immediately preceding the computation date. The computation of such "experience factor" shall be to six (6) decimal places.

(ii) Each deficit employer shall be given a "deficit experience factor" which shall be the ratio of excess of benefits paid on the employer's account over contributions since December 31, 1939, to his average annual taxable payroll rounded to the next lower dollar amount for one (1) or more fiscal years, but not to exceed four (4) fiscal years, for which he had covered employment ending on the computation date; provided, however, that any employer who on any computation date has a "deficit experience factor" for the period immediately preceding such computation date but who has filed all reports, paid all contributions and penalties due on or before the cut-off date, and has during the last four (4) fiscal years paid contributions at a rate of not less than the standard rate applicable for each such year and in excess of benefits charged to his experience rating account during such years, shall have any balance of benefits charged to his account which on the computation date immediately preceding such four (4) fiscal years were in excess of contributions paid, deleted from his account, and the excess benefits so deleted shall not be considered in the computation of his taxable wage rate for the rate years following such four (4) fiscal years. For the rate year following such computation date, he shall be given the standard rate for that year.

(iii) In the event an employer's coverage has been terminated because he has ceased to do business or because he has not had covered employment for a period of four (4) years, and if said employer thereafter becomes a covered employer, he will be considered as though



he were a new employer, and he shall not be credited with his previous experience under this chapter for the purpose of computing any future "experience factor."

(b) Schedules shall be prepared listing all eligible employers in inverse numerical order of their experience factors, and all deficit employers in numerical order of their deficit experience factors. There shall be listed on such schedules for each such employer in addition to the experience factor (i) the amount of his taxable payroll for the fiscal year ending on the computation date, and (ii) a cumulative total consisting of the sum of such employer's taxable payroll for the fiscal year ending on the computation date and the corresponding taxable payrolls for all other employers preceding him on such schedules.

(c) The cumulative taxable payroll amounts listed on the schedules provided for in paragraph (b) of this subsection shall be segregated into groups whose limits shall be those set out in the table provided in section 72-1350(7), Idaho Code. Each of such groups shall be identified by the rate class number listed in the table which represents the percentage limits of each group. Each employer on the schedules shall be assigned a taxable wage rate in accordance with section 72-1350, Idaho Code.

(d)(i) If the grouping of rate classes requires the inclusion of exactly one-half ( $\frac{1}{2}$ ) of an employer's taxable payroll, the employer shall be assigned the lower of the two (2) rates designated for the two (2) classes in which the halves of his taxable payroll are so required.

(ii) If the group of rate classes requires the inclusion of a portion other than exactly one-half ( $\frac{1}{2}$ ) of an employer's taxable payroll, the employer shall be assigned the rate designated for the class in which the greater part of his taxable payroll is so required.

(iii) If one (1) or more employers on the schedules have experience factors identical to that of the last employer included in a particular rate class, all such employers shall be included in and assigned the taxable wage rate specified for such class, notwithstanding the provisions of paragraph (c) of this subsection.

(e) If the taxable payroll amount or the experience factor or both such taxable payroll amount and experience factor of any eligible or deficit employer listed on the schedules is changed, the employer shall be placed in that position on the schedules which he would have occupied had his taxable payroll amount and/or experience factor as changed been used in determining his position in the first instance, but such change shall not affect the position or rate classification of any other employer listed on the schedules and shall not affect the rate determination for previous years.

(2) For experience rating purposes, all previously accumulated benefit charges to covered employers' accounts, except cost reimbursement employers, shall not be changed except as provided by this chapter. Benefits paid prior to June 30 shall, as of June 30 of each year preceding the calendar year for which a covered employer's taxable wage rate is effective, be charged to the account of the covered employer, except cost reimbursement employers, who paid the largest individual amount of base period wages as shown on the determination used as the basis for the payment of such benefits, except

that no charge shall be made to the account of such covered employer with respect to benefits paid under the following situations:

- (a) If paid to a worker who terminated his services voluntarily without good cause attributable to such covered employer, or who had been discharged for misconduct in connection with such services;
- (b) If paid in accordance with the provisions of section 72-1368(10), Idaho Code, and the decision to pay benefits is subsequently reversed;
- (c) For that portion of benefits paid to multistate claimants pursuant to section 72-1344, Idaho Code, which exceeds the amount of benefits that would have been charged had only Idaho wages been used in paying the claim;
- (d) If paid in accordance with the extended benefit program triggered by either national or state indicators;
- (e) If paid to a worker who continues to perform services for such covered employer without a reduction in his customary work schedule, and who is eligible to receive benefits due to layoff or a reduction in earnings from another employer.

(3) A covered employer whose experience rating account is chargeable, as prescribed by this section, is an interested party as defined in section 72-1323, Idaho Code. A determination of chargeability shall become final unless, within fourteen (14) days after notice as provided in section 72-1368(5), Idaho Code, an appeal is filed by an interested party with the department in accordance with the department's rules.

(4) An experience rating record shall be maintained for each covered employer. The record shall be credited with all contributions which the covered employer has paid for covered employment prior to the cut-off date, pursuant to the provisions of this and preceding acts, and which covered employment occurred prior to the computation date. The record shall also be charged with the amount of benefits paid which are chargeable to the covered employer's account as provided by the appropriate provisions of the employment security law and regulations thereunder in effect at the time such benefits were paid. Nothing in this section shall be construed to grant any covered employer or individual in his service a priority with respect to any claim or right because of amounts paid by such covered employer into the employment security fund.

(5)(a) Whenever any individual or type of organization (whether or not a covered employer within the meaning of section 72-1315, Idaho Code) in any manner succeeds to, or acquires all or substantially all, of the business of an employer who at the time of acquisition was a covered employer, and in respect to whom the director finds that the business of the predecessor is continued solely by the successor, the separate experience rating account of the predecessor shall, upon the joint application of the predecessor and the successor within the one hundred eighty (180) days after such acquisition and approval by the director, be transferred to the successor employer for the purpose of determining such successor's liability and taxable wage rate and any successor who was not an employer on the date of acquisition shall as of such date become a covered employer as defined in this chapter. Such one hundred eighty (180) day



period may be extended at the discretion of the director. The transfer of the predecessor's experience rating account as of the last computation date to the successor shall be mandatory if the management or ownership or control is substantially the same for the successor as for the predecessor and there is a continuity of business activity by the successor.

(b) Whenever any individual or type of organization, whether or not a covered employer within the meaning of section 72-1315, Idaho Code, in any manner succeeds to, or acquires, part of the business of an employer who at the time of acquisition was a covered employer, and such portion of the business is continued by the successor, so much of the separate experience rating account of the predecessor as is attributable to the portion of the business transferred, as determined on a pro rata basis in the same ratio that the wages of covered employees properly allocable to the transferred portion of the business bears to the payroll of the predecessor in the last four (4) completed calendar quarters immediately preceding the date of transfer, shall, upon the joint application of the predecessor and the successor within one hundred eighty (180) days after such acquisition and approval by the director, be transferred to the successor employer for the purpose of determining such successor's liability and taxable wage rate and any successor who was not an employer on the date of acquisition shall as of such date become a covered employer as defined in this chapter. Such one hundred eighty (180) day period may be extended at the discretion of the director. The transfer of the predecessor's experience rating account as of the last computation date to the successor shall be mandatory if the management or ownership or control is substantially the same for the successor as for the predecessor and there is a continuity of business activity by the successor. Whenever such mandatory transfer involves only a portion of the experience rating record, and the predecessor or successor employers fail within ten (10) days after notice to supply the required payroll information, the transfer shall be based on estimates of the allocable payrolls.

(c)(i) If the successor was a covered employer prior to the date of the acquisition of all or a part of the predecessor's business his taxable wage rate, effective the first day of the calendar quarter immediately following the date of acquisition, shall be a newly computed rate based on the combined experience of the predecessor and successor, the resulting rate remaining in effect the balance of the rate year.

(ii) If the successor was not a covered employer prior to the date of the acquisition of all or a part of the predecessor's business, his rate shall be the rate applicable to the predecessor with respect to the period immediately preceding the date of acquisition, but if there were more than one (1) predecessor the successor's rate shall be a newly computed rate based on the combined experience of the predecessors, becoming effective immediately after the date of acquisition, and shall remain in effect the balance of the rate year.

(d) For purposes of this section, an employer's experience rating account shall consist of the actual contribution, benefit and taxable payroll experience of the employer and any amounts due from the employer under

this chapter. When a transferred experience rating account includes amounts due from the employer under this chapter, both the predecessor employer and the successor employer shall be jointly and severally liable for those amounts. [1947, ch. 269, § 51, p. 793; am. 1949, ch. 144, § 51, p. 252; am. 1951, ch. 236, § 6, p. 482; am. 1953, ch. 180, § 1, p. 272; am. 1955, ch. 18, § 6, p. 20; am. 1957, ch. 158, § 2, p. 274; am. 1963, ch. 314, § 7, p. 841; am. 1965, ch. 203, § 1, p. 456; am. 1967, ch. 117, § 8, p. 233; am. 1971, ch. 142, § 12, p. 595; am. 1975, ch. 126, § 6, p. 259; am. 1980, ch. 264, § 5, p. 682; am. 1986, ch. 24, § 2, p. 71; am. 1991, ch. 119, § 7, p. 248; am. 1998, ch. 1, § 67, p. 3; am. 2004, ch. 24, § 4, p. 32; am. 2005, ch. 5, § 9, p. 6.]

### STATUTORY NOTES

**Cross References.** — Claims for benefits and appellate procedure, § 72-1368.

“Crew leader” defined, § 72-1320.

Payment of contributions, § 72-1349.

Reciprocal arrangements and cooperation, § 72-1344.

**Compiler’s Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1953, ch. 180 declared an emergency. Approved March 12, 1953.

Section 9 of S.L. 1963, ch. 314 declared an

emergency. Approved March 28, 1963.

Section 7 of S. L. 1975, ch. 126 provided that the act should take effect on and after January 1, 1976.

Section 5 of S.L. 2004, ch. 24 provided “An emergency existing therefor, which emergency is hereby declared to exist, Section 4 of this act shall be in full force and effect on and after passage and approval.” Approved March 5, 2004.

Section 17 of S.L. 2005, ch. 5 declared an emergency retroactively to January 1, 2005.

### JUDICIAL DECISIONS

#### ANALYSIS

Determination of experience rate.

Employer status.

Redetermination of rate.

Wages paid retained employees.

#### Determination of Experience Rate.

First experience rate of employer in 1947 and any year thereafter is determined by deleting any benefit payments made to any of its employees discharged for cause since December 31, 1939. In re Potlatch Forests, Inc., 72 Idaho 291, 240 P.2d 242 (1952).

In proceeding by employer to determine 1949 experience rate it was error to strike payroll records of employer from the evidence, where agency had destroyed its records covering years of 1939 to 1948. In re Potlatch Forests, Inc., 72 Idaho 291, 240 P.2d 242 (1952).

New corporation, which took over one of the stores operated by old corporation, was entitled to rating of old corporation, where the new corporation’s stockholders were the same as the old, the business continued at the old location, and the management was the same. In re Okay Shopping Ctr., Inc., 77 Idaho 524, 296 P.2d 1031 (1956).

A denial of a reduced rating to an employer earned through a period close to ten years would be inequitable upon a showing that the failure to submit the required tax reports to the employment security agency by the employer as required was in minor nature, due to a change in bookkeepers, the employer having acted in good faith and never before through said period of years had been delinquent, always maintaining a special account in which tax accruals were deposited, further that the said employer acted promptly upon discovery of the nonsubmission of the required report. In re Markham’s, Inc., 79 Idaho 307, 316 P.2d 553 (1957).

#### Employer Status.

Notification of a rate of contribution pursuant to this section does not constitute a conclusive determination of the “covered” status of an employer under § 72-1353. Totusek v. Department of Emp., 96 Idaho 699, 535 P.2d 672 (1975).



**Redetermination of Rate.**

Failure of employer to file application for redetermination of 1947 rate was not binding where it protested that erroneous charges had been used in determination of rate, if rate in 1947 was 1.1 the lowest possible rate under the statute. In re Potlatch Forests, Inc., 72 Idaho 291, 240 P.2d 242 (1952).

The board under its granted broad powers was clearly authorized to rehear the entire controversy of the determination by the chief of contributions that the involved corporation was ineligible for reduced contribution rate, to make its own findings of fact and draw its own conclusions and was not limited to questions of law. In re Markham's, Inc., 79 Idaho 307, 316 P.2d 553 (1957).

**Wages Paid Retained Employees.**

Corporation which acquired partnership in 1953 was entitled to add the wages paid the retained employees by the partnership during the first two quarters to those paid during the last two quarters by the corporation in computing the exemption on wages paid retained employees. In re Central Eureka Corp., 76 Idaho 287, 281 P.2d 665 (1956).

**Cited in:** Appeal of MacKenzie Auto. Equip. Co., 71 Idaho 362, 232 P.2d 130 (1951); Link's Sch. of Bus. v. Emp. Sec. Agency, 85 Idaho 519, 380 P.2d 506; Department of Emp. v. Kasum Communications, 97 Idaho 372, 544 P.2d 1142 (1976); Sheppard v. State, Dep't of Emp., 103 Idaho 501, 650 P.2d 643 (1982).

**72-1351A. Federal conformity provisions regarding transfers of experience and assignment of rates.** — Notwithstanding any other provision of this chapter, the following shall apply regarding transfers of experience and assignment of rates:

(1)(a) If a covered employer transfers its trade or business, or a portion thereof, to another covered employer and, at the time of the transfer, there is substantially common ownership, management or control of the two (2) employers, then the experience rating account attributable to the transferred trade or business shall be transferred to the employer to whom such business is so transferred. The rates of both employers shall be recalculated using the methods provided in section 72-1351(5)(b) and (c)(i), Idaho Code.

(b) If, following a transfer of experience under paragraph (a) of this subsection (1), the director determines that a substantial purpose of the transfer of the trade or business was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate shall be assigned to such account.

(2) Whenever a person who is not a covered employer under this chapter at the time such person acquires the trade or business of a covered employer, the experience rating account of the acquired business shall not be transferred to such person if the director finds that such person acquired the business primarily for the purpose of obtaining a lower rate of contributions. Instead, such person shall be assigned the standard rate for new employers under section 72-1350, Idaho Code. In determining whether the trade or business was acquired primarily for the purpose of obtaining a lower rate of contributions, the director shall use objective factors which may include, but are not limited to, the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.

(3)(a) It shall be a violation of this section if a person:

(i) Makes any false statement to the department when the maker knows the statement to be false or acts with deliberate ignorance of or

reckless disregard for the truth of the matter or willfully fails to disclose a material fact to the department in connection with the transfer of a trade or business;

(ii) Prepares any false or antedated report, form, book, paper, record, written instrument, or other matter or thing in connection with the transfer of a trade or business with the intent to submit it or allow it to be submitted to the department as genuine or true;

(iii) Knowingly violates or attempts to violate subsection (1) or (2) of this section or any other provision of this chapter related to determining the assignment of a contribution rate or an experience rate; or

(iv) Knowingly advises another person in a way that results in a violation or an attempted violation of subsection (1) or (2) of this section or any other provision of this chapter related to determining the assignment of a contribution rate or an experience rate.

(b) If a person commits any of the acts described in paragraph (a) of this subsection (3), the person shall be subject to the following penalties:

(i) If the person is a covered employer, a civil money penalty of ten percent (10%) of such person's taxable wages for the four (4) completed consecutive quarters preceding the violation shall be imposed for such year and said penalty shall be deposited in the state employment security administrative and reimbursement fund as established by section 72-1348, Idaho Code.

(ii) If the person is not a covered employer, such person shall be subject to a civil money penalty of not more than five thousand dollars (\$5,000) for each violation. Any such penalty shall be deposited in the state employment security administrative and reimbursement fund as established by section 72-1348, Idaho Code.

(4) Every person who knowingly makes any false statement to the department or knowingly fails to disclose a material fact to the department in connection with the transfer of a trade or business, or knowingly prepares any false or antedated report, form, book, paper, record, written instrument, or other matter or thing in connection with the transfer of a trade or business with the intent to submit it or allow it to be submitted to the department as genuine or true, or knowingly violates or attempts to violate subsection (1) or (2) of this section or any other provision of this chapter related to determining the assignment of a contribution rate or an experience rate, or knowingly advises another person to act in a way that results in a violation or an attempted violation of subsection (1) or (2) of this section or any other provision of this chapter related to determining the assignment of a contribution rate or an experience rate, shall be guilty of a felony punishable as provided in section 18-112, Idaho Code.

(5) For purposes of this section:

(a) An employer's experience rating account shall consist of the actual contribution, benefit and taxable payroll experience of the employer and any amounts due from the employer under this chapter. When a transferred experience rating account includes amounts due from the employer under this chapter, both the predecessor employer and the successor employer shall be jointly and severally liable for those amounts.



(b) "Knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved.

(c) "Person" has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986 (26 U.S.C. 7701(a)(1)).

(d) A "transfer of a trade or business" occurs whenever a person in any manner succeeds to all or a portion of a trade or business.

(e) "Trade or business" includes, but is not limited to, the employer's workforce. The transfer of some or all of an employer's workforce to another employer shall be considered a transfer of a trade or business when, as the result of such transfer, the transferring employer no longer performs trade or business with respect to the transferred workforce, and such trade or business is performed by the employer to whom the workforce is transferred.

(f) "Violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation or willful nondisclosure.

(6) The director shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(7) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States department of labor. [I.C., § 72-1351A, as added by 2005, ch. 12, § 1, p. 36.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-1351A, which § 3, p. 539, was repealed by S.L. 1963, ch. comprised I.C., § 72-1351A, as added by 314, § 8.  
1959, ch. 53, § 1, p. 112; am. 1961, ch. 298,

#### **72-1352. Period, termination, and election of employer coverage.**

— (1) Except as otherwise provided in subsection (3) of this section, any employer who is or becomes a covered employer within any calendar year shall be deemed to be a covered employer until his coverage is terminated.

(2) The coverage of any covered employer may be terminated if:

(a) As of the close of any calendar quarter, it is found that such covered employer had no individuals performing services for him in covered employment, and that the continued operation of his trade, profession, or business is not likely to result in his having a quarterly payroll of one thousand five hundred dollars (\$1,500) or more within the ensuing two (2) calendar quarters; or

(b) As of the close of a calendar year, it is found that such covered employer did not pay or become liable to pay for services rendered to him in covered employment wages amounting to one thousand five hundred dollars (\$1,500) or more in any calendar quarter of such year, and that the continued operation of his trade, profession, or business is not likely to create covered employment as defined in section 72-1316, Idaho Code, within the ensuing calendar year.

(c) Notwithstanding the provisions in subsection (2)(a) or (2)(b), the coverage of an employer may not be terminated if he is or was subject

under the provisions of the federal unemployment tax act during the current or preceding calendar year.

(3) Any employer for whom services are performed in this state which do not constitute covered employment, may file with the director a written request that all such services shall be deemed to constitute covered employment. Upon approval by the director, such services shall be deemed to constitute covered employment from the date stated in such approval for not less than two (2) calendar years. Such services shall cease to be covered employment as of January 1 of any calendar year subsequent to such two (2) calendar years, if not later than January 31 of such year either such employer has filed with the director a written notice of termination, or the director on his own motion, has given notice of termination of such coverage.

(4) Benefits payable to the employees thus covered will be payable on the same basis and conditions that apply to all other covered employees. [1947, ch. 269, § 52, p. 793; am. 1949, ch. 144, § 52, p. 252; am. 1955, ch. 18, § 7, p. 20; am. 1967, ch. 117, § 9, p. 233; am. 1971, ch. 142, § 13, p. 595; am. 1976, ch. 207, § 5, p. 754; am. 1977, ch. 179, § 15, p. 464; am. 1997, ch. 217, § 2, p. 639; am. 1998, ch. 1, § 68, p. 3.]

#### STATUTORY NOTES

**Cross References.** — Covered employment, § 72-1316.

**Federal References.** — The federal un-

employment tax act, referred to in this section, is compiled as 26 U.S.C., §§ 3301-3308.

#### JUDICIAL DECISIONS

##### **Successor in Interest.**

Employer who changed form of business from operation as an individual to corporation on January 2, 1945 was entitled to experience

rating established as an individual even though 1945 Act made no provision for "successor in interest." *Appeal of MacKenzie Auto. Equip. Co.*, 71 Idaho 362, 232 P.2d 130 (1951).

**72-1353. Administrative determinations of coverage.** — (1) The director may, upon his own motion or upon application of any employer, make findings of fact and on the basis thereof determine whether such employer is a covered employer and whether services performed for or in connection with the business of such employer constitutes covered employment. The determination shall become final unless, within fourteen (14) days after notice, an appeal is filed with the department setting forth the grounds for such appeal. A notice shall be deemed served if delivered to the person being served or if mailed to his last known address; service by mail shall be deemed complete on the date of mailing. Proceedings on appeal shall be had in accordance with the provisions of section 72-1361, Idaho Code.

(2) In making any determination with respect to whether the services performed by a worker are performed in covered employment, the director may, on the basis of the available evidence, determine that other workers performing similar services for the employer are similarly situated with respect to the coverage of said services under the provision of this chapter, and that such services constitute covered employment.



(3) In any proceeding to determine whether an employer is a covered employer or whether services are performed in covered employment, it shall be the burden of the employer to prove that the employer is not a covered employer, that services were not performed in covered employment, or that workers are not similarly situated with respect to the coverage of their services. [1947, ch. 269, § 53, p. 793; am. 1949, ch. 144, § 53, p. 252; am. 1965, ch. 203, § 2, p. 456; am. 1989, ch. 57, § 3, p. 78; am. 1998, ch. 1, § 69, p. 3.]

## JUDICIAL DECISIONS

### ANALYSIS

Constitutionality.  
Employer status.

#### Constitutionality.

By exercising his authority in the execution of his statutory duties by making the determination of whether or not an employer is a "covered employer," the director did not assume or usurp judicial powers and functions. Further the employer was afforded an opportunity to be heard and a right of appeal to the industrial accident board and an appeal from that board to the Supreme Court. Such legislation did not attempt to give such finality to the determination made by the administrative agency that property and constitutional rights of citizens might be conclusively deter-

mined without right to adequate judicial review. *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963).

#### Employer Status.

Notification of a rate of contribution pursuant to § 72-1351 does not constitute a conclusive determination of the "covered" status of an employer under this section. *Totusek v. Department of Emp.*, 96 Idaho 699, 535 P.2d 672 (1975).

**Cited in:** *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1965).

**72-1354. Penalty on unpaid amounts.** — If any amounts due under this chapter are not paid by any covered employer on or before the date on which they are due, such amounts shall bear penalty at the rate of four percent (4%) or twenty dollars (\$20.00), whichever is the larger, for each month or fraction thereof until paid; provided, that in no case shall the penalty exceed the actual amounts due. The date of payment shall be deemed the date of actual receipt by the director, or if mailed, the date of mailing. Penalties collected pursuant to this section shall be paid into the state employment security administrative and reimbursement fund as established by section 72-1348, Idaho Code. At the discretion of the director, the department may compromise the amount of penalty collected pursuant to this section if the employer shows he had good cause for failing to timely pay contributions. [1947, ch. 269, § 54, p. 793; am. 1949, ch. 144, § 54, p. 252; am. 1955, ch. 18, § 8, p. 20; am. 1976, ch. 191, § 1, p. 706; am. 1980, ch. 264, § 6, p. 682; am. 1989, ch. 57, § 4, p. 78; am. 1991, ch. 151, § 1, p. 360; am. 1998, ch. 1, § 70, p. 3; am. 2005, ch. 5, § 10, p. 6.]

## STATUTORY NOTES

**Cross References.** — Establishment of state employment security administrative and reimbursement fund, § 72-1348.

**Effective Dates.** — Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

## JUDICIAL DECISIONS

**Past Good Faith.**

A denial of a reduced rating to an employer earned through a period close to ten years would be inequitable upon a showing that the failure to submit the required tax reports to the employment security agency by the employer as required was in minor nature, due to a change in bookkeepers, the employer having acted in good faith and never before

through said period of years had been delinquent, always maintaining a special account in which tax accruals were deposited, further that the said employer acted promptly upon discovery of the nonsubmission of the required report. In re Markham's, Inc., 79 Idaho 307, 316 P.2d 553 (1957).

**Cited in:** Link's Sch. of Bus. v. Emp. Sec. Agency, 85 Idaho 519, 380 P.2d 506 (1963).

## RESEARCH REFERENCES

**A.L.R.** — Construction, application, and effect, with respect to social security and unemployment compensation taxes, of stat-

utes imposing penalties for tax evasion or default. 22 A.L.R.3d 8.

**72-1355. Collection by suit.** — (1) Civil actions in the district court may be brought to collect any amount due under the employment security law of this state or any other state or the federal government in the same manner provided by law for collection of debt. Any person found liable for any amount due under this chapter shall pay the costs of such action. No proceeding or action shall be maintained and no writ or process shall be issued by any court which has the purpose or effect of delaying the collection of any amounts due under this chapter or substituting any collection procedure for those prescribed in this chapter.

(2) Any person who fails to comply with section 72-1349 or 72-1349A, Idaho Code, for a period of thirty (30) days or more may be enjoined by the district court of any county in which such person does business from carrying on his business while such delinquency continues.

(3) All proceedings in the courts are to be brought by the director in the name of the state of Idaho. [1947, ch. 269, § 55, p. 793; am. 1949, ch. 144, § 55, p. 252; am. 1998, ch. 1, § 71, p. 3.]

## JUDICIAL DECISIONS

## ANALYSIS

Concealment.  
Constitutionality.  
Payment of costs.

**Concealment.**

Plaintiffs, who took mortgage from defunct company to secure advance and loan from bank, which money was used by company to pay delinquent taxes to federal and state government, were not guilty of concealment as to foreclosure proceedings subsequently instituted by plaintiffs under which they took possession, since creditors were in no worse position than if the property had been seized by government for delinquent taxes. *Saccomano v. North Idaho Shingle Co.*, 73 Idaho 284, 252 P.2d 518 (1952).

**Constitutionality.**

The contention of defendant that part "c" [now (3)] of this section is an attempt to exclude the courts from the exercise of powers properly belonging to the judicial department and was contrary to the constitution in that such part sets up a new court, places the employer on trial where the director makes findings of fact and conclusions of law, such being judicial functions, falls before the Supreme Court's recognition of the power of the legislature to confer upon administrative officers and agencies of the executive depart-



ment functions and powers, quasi-judicial in character to make findings of fact and to enter orders and judgments thereon in the application of legislative acts to such fact determinations, the court further having held that such legislation was not repugnant to the constitution as a delegation of legislative power so long as it provides for notice, an opportunity for a fair hearing and there is no attempt to give finality to the determination. *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963).

#### **Payment of Costs.**

As this section authorizes the director to

pay costs necessarily incurred in bringing any civil action for collection of delinquent payment of contributions or penalties thereon, it authorizes him, by implication, to pay costs awarded prevailing party in litigation commenced by or directed against agency, such costs being an incident to the administration of the law. *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1963).

**Cited in:** *In re Markham's, Inc.*, 79 Idaho 307, 316 P.2d 553 (1957).

### **72-1355A. Contractors' and principals' liability for contributions.**

— No covered employer which contracts with any contractor or subcontractor who is a covered employer under the provisions of this chapter shall make final payment to such contractor or subcontractor for any indebtedness due, until after the contractor or subcontractor has paid or has furnished a good and sufficient bond acceptable to the director for payment of contributions due, or to become due, in respect to personal services which have been performed by individuals for such contractor or subcontractor. Failure to comply with the provisions of this section shall render said covered employer directly liable for such contributions; and the director shall have all of the remedies of collection against said covered employer under the provisions of this chapter as though the services in question were performed directly for said covered employer. [I.C., § 72-1355A, as added by 1963, ch. 316, § 4, p. 864; am. 1998, ch. 1, § 72, p. 3.]

## **JUDICIAL DECISIONS**

### **ANALYSIS**

Final payment.

—Attorney's fees.

#### **Final Payment.**

Where contract provided for payment every two weeks for work performed less a 10% holdback and principal made the payments but still held the 10%, there was no "final payment." *Department of Emp. v. Diamond Int'l Corp.*, 96 Idaho 386, 529 P.2d 782 (1974).

Where the parties' contract provided that the final payment would be the one made after the work was completed and all adjustments were made from the retainage, it was not contemplated that a regular periodic progress payment would be a final payment under the contract; thus, employer's April 16 progress payment did not constitute "final payment" for purposes of liability under this

section and employer was not liable for payment of contractor's unemployment taxes. *Northwest Pipeline Corp. v. State, Dep't of Emp.*, 129 Idaho 548, 928 P.2d 898 (1996).

#### **—Attorney's fees.**

Although it was held employer's payment was not "final payment" under this section, it would go too far to rule that the department of employment acted without a reasonable basis in law or fact as to the definition of "final payment" under this section; thus, employer was not entitled to an award of attorney's fees under § 12-117. *Northwest Pipeline Corp. v. State, Dep't of Emp.*, 129 Idaho 548, 928 P.2d 898 (1996).

**72-1356. Priorities.** — Where the assets of an employer subject to the provisions of this chapter are distributed by an order of court under Idaho

law, including any receivership, assignment for the benefit of creditors, adjudication of insolvency, composition, administration of estates of decedents, or similar proceeding, amounts then or thereafter due under this chapter must be paid in full prior to all other unsecured claims except taxes, claims arising under the worker's compensation act, and claims for wages of not more than two hundred fifty dollars (\$250) to each claimant earned within four (4) months of the commencement of proceedings. In the case of such an employer's adjudication of bankruptcy, judicially confirmed extension proposal or composition under the bankruptcy law, amounts then or thereafter due under this chapter are entitled to such priority as is now or may hereafter be granted under 11 U.S.C. 507. [1947, ch. 269, § 56, p. 793; am. 1949, ch. 144, § 56, p. 252; am. 1998, ch. 1, § 73, p. 3.]

#### STATUTORY NOTES

**Federal References.** — Federal Bankruptcy Law, referred to in this section, is compiled as 11 U.S.C. § 101 et seq.

#### JUDICIAL DECISIONS

**Cited in:** Link's Sch. of Bus. v. Emp. Sec. Agency, 85 Idaho 519, 380 P.2d 506 (1963).

**72-1357. Adjustments and refunds.** — (1) If any person shall make application for a refund or credit of any amounts paid under this chapter, the director shall, upon determining that such amounts or any portion thereof was erroneously collected, either allow credit therefor, without interest, in connection with subsequent payments, or shall refund from the fund in which the erroneous payment was deposited, without interest, the amount erroneously paid.

(2) No refund or credit shall be allowed unless an application therefor is made on or before whichever of the following dates is later:

- (a) One (1) year from the date on which such payment was made; or
- (b) Three (3) years from the last day of the calendar quarter with respect to which such payment was made. For a like cause and within the same period a refund may be so made, or credit allowed, on the initiative of the director. Nothing in this chapter shall be construed to authorize any refund or credit of moneys due and payable under the law and regulations in effect at the time such moneys were paid.

(3) In the event that any application for refund or credit is rejected in whole or in part, a written notice of rejection shall be forwarded to the applicant. Within fourteen (14) days after the mailing of such notice to the applicant's last known address, or in the absence of such mailing, within fourteen (14) days after delivery thereof, the applicant may appeal to the director for a hearing with regard to the rejection, setting forth the grounds for such appeal. Proceedings on the appeal shall be in accordance with the provisions of section 72-1361, Idaho Code. [1947, ch. 269, § 57, p. 793; am. 1949, ch. 144, § 57, p. 252; am. 1965, ch. 203, § 3, p. 456; am. 1976, ch. 207, § 6, p. 754; am. 1998, ch. 1, § 74, p. 3.]



### STATUTORY NOTES

**Cross References.** — Appeals to the commission, § 72-1361.

### JUDICIAL DECISIONS

**Cited in:** Department of Emp. v. St. Alphonsus Hosp., 96 Idaho 470, 531 P.2d 232 (1975).

### DECISIONS UNDER PRIOR LAW

#### Jurisdiction of District Court.

In action to collect unemployment tax the district court had the power to find whether employer came within act, number of employees on whom tax was to be paid and wages of

employees, but neither the court nor industrial accident board had the power to assess. *State v. Ada County Dairymen's Ass'n*, 66 Idaho 317, 159 P.2d 219 (1945).

**72-1358. Determination of amounts due upon failure to report.** — If any covered employer fails to file a report when due under this chapter, or if such report when filed is incorrect or insufficient, the director may, on the basis of available information, determine the amount of wages paid in covered employment during the periods with respect to which the reports were or should have been made and the amount due under this chapter from the employer. The director shall give written notice of the determination to the employer. The determination shall become final unless the employer, within fourteen (14) days after the mailing of the notice to the employer's last known address, or, in the absence of such mailing, within fourteen (14) days after delivery thereof, files an appeal with the department. Proceedings on the appeal shall be in accordance with the provisions of section 72-1361, Idaho Code. [1947, ch. 269, § 58, p. 793; am. 1949, ch. 144, § 58, p. 252; am. 1965, ch. 203, § 4, p. 456; am. 1998, ch. 1, § 75, p. 3.]

### STATUTORY NOTES

**Cross References.** — Appeals to the commission, § 72-1361.

Penalties on unpaid contributions, § 72-1354.

### JUDICIAL DECISIONS

#### Rehearing.

The board under its granted broad powers was clearly authorized to rehear the entire controversy of the determination by the chief of contributions that the involved corporation was ineligible for reduced contribution rate, to make its own findings of fact and draw its own conclusions and was not limited to ques-

tions of law. In *re Markham's, Inc.*, 79 Idaho 307, 316 P.2d 553 (1957).

**Cited in:** *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963); *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1963); *Garrett v. Kline*, 87 Idaho 456, 394 P.2d 157 (1964).

**72-1359. Jeopardy assessments.** — If the director determines that the collection of any amounts due from any covered employer under the provisions of this chapter will be jeopardized by delay, he may, whether or not the time prescribed by this chapter or any rules issued pursuant thereto

for making reports and payments has expired, determine, on the basis of available information, the wages paid by such employer for covered employment and declare the amount due thereon immediately payable, and shall give written notice of such declaration to such employer. Any amounts, including penalty and interest, that are contained in such written declaration shall be subject to immediate seizure pursuant to section 72-1360A, Idaho Code, as well as through any other collection procedures allowed under law. Such jeopardy assessment shall become conclusive and binding upon the employer unless, within fourteen (14) days after the mailing of such declaration to the last known address of such employer or in the absence of such mailing, within fourteen (14) days after personal delivery upon the employer, the employer files an appeal to the department setting forth grounds for such appeal. In such cases, the right of appeal shall be conditioned upon the payment of the amount declared to be due, less any amount already collected, or upon giving appropriate security to the director for the payment thereof. Proceedings on such appeals shall be in accordance with the provisions of section 72-1361, Idaho Code. [1947, ch. 269, § 59, p. 793; am. 1949, ch. 144, § 59, p. 252; am. 1965, ch. 203, § 5, p. 456; am. 1980, ch. 264, § 7, p. 682; am. 1991, ch. 119, § 8, p. 248; am. 1998, ch. 1, § 76, p. 3; am. 2005, ch. 5, § 11, p. 6.]

#### STATUTORY NOTES

**Cross References.** — Appeals to the commission, § 72-1361.

**Effective Dates.** — Section 9 of S.L. 1991, ch. 119 declared an emergency and provided that the act shall be in full force and effect on

and after its passage and approval retroactive to January 1, 1991. Approved March 28, 1991.

Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

#### JUDICIAL DECISIONS

**Cited in:** Link's Sch. of Bus. v. Emp. Sec. Agency, 85 Idaho 519, 380 P.2d 506 (1963);

Garrett v. Kline, 87 Idaho 456, 394 P.2d 157 (1964).

**72-1360. Liens.** — (1) Upon the failure of any person to pay any amount when due under this chapter, including the failure to repay overpayments as that term is defined in section 72-1369, Idaho Code, the director may file with the office of the secretary of state, as provided in chapter 19, title 45, Idaho Code, a notice of lien.

(2) Upon delivery to the secretary of state, the notice of lien shall be filed and maintained in accordance with chapter 19, title 45, Idaho Code. When such notice is duly filed, all amounts due shall constitute a lien upon the entire interest, legal or equitable, in any property of such person, real or personal, tangible or intangible, not exempt from execution, situated in the state. Such lien may be enforced by the director or by any sheriff of the various counties in the same manner as a judgment of the district court duly docketed and the amount secured by the lien shall bear interest at the rate of one and one-half (1 ½) times the rate computed for judgments pursuant to section 28-22-104(2), Idaho Code, in effect on January 1 of the year in which the lien is filed, rounded up to the nearest one-eighth percent (⅛%).



The foregoing remedy shall be in addition to all other remedies provided by law. The amount of interest collected pursuant to this section may be compromised at the discretion of the director when such compromise is in the best interest of the department.

(3) In any suit or action involving the title to real or personal property against which the state has a perfected lien, the state shall be made a party to such suit or action. [1947, ch. 269, § 60, p. 793; am. 1949, ch. 144, § 60, p. 252; am. 1963, ch. 316, § 5, p. 864; am. 1976, ch. 191, § 2, p. 706; am. 1989, ch. 57, § 5, p. 78; am. 1997, ch. 205, § 6, p. 607; am. 1998, ch. 1, § 77, p. 3; am. 2005, ch. 5, § 12, p. 6.]

### STATUTORY NOTES

**Effective Dates.** — Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

### JUDICIAL DECISIONS

#### ANALYSIS

Defenses.

Exemption from filing fees.

Statute of limitations.

#### Defenses.

In foreclosure proceedings under this section the trial court determines whether the lien is regular upon its face and whether the court has jurisdiction; defendant cannot raise questions as to matters subject to the determination of the director for which defendant has administrative remedies and right to appeal to the Supreme Court. *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963).

#### Exemption from Filing Fees.

In seeking to compel defendant county auditor and recorder to accept for filing and recordation instruments designed for creation of tax liens and to issue writs of execution thereon, without payment of statutory fees, plaintiff state agency properly proceeded by writ of mandate. *Garrett v. Kline*, 87 Idaho 456, 394 P.2d 157 (1964).

#### Statute of Limitations.

Although the business owners argued that a lien filed with the Secretary of State under § 72-1360 seeking to enjoin the enforcement of a lien for unpaid unemployment insurance contributions filed by the Idaho Department of Labor was the commencement of a civil action, they offered no authority or argument to support that contention; the general statute of limitations did not apply to the issuance of a writ of execution because it was neither an action nor a special proceeding of a civil nature, such that the district court did not err in holding that the filing of the lien was not barred by § 5-218. *Beale v. State*, 139 Idaho 356, 79 P.3d 715 (2003).

**Cited in:** Link's Sch. of Bus. v. Emp. Sec. Agency, 85 Idaho 519, 380 P.2d 506 (1963).

### DECISIONS UNDER PRIOR LAW

#### Limitations.

The taxes and penalties constituted a statutory liability within three-year statute of limitation, this liability being dependent on

statute and not contract of parties for its existence. *State v. Ada County Dairymen's Ass'n*, 66 Idaho 317, 159 P.2d 219 (1945).

**72-1360A. Collection of lien amounts.** — (1) In addition to all other remedies or actions provided by this chapter, it shall be lawful for the director or his agent to collect any amounts secured by liens created pursuant to this chapter by seizure and sale of the property of any person

liable for such amounts who fails to pay the same within thirty (30) days from the mailing of notice and demand for payment thereof.

(2) Property exempt from seizure shall be the same property as is exempt from execution under the provisions of chapter 6, title 11, Idaho Code.

(3) In exercising his authority under subsection (1) of this section, the director may levy, or by his warrant, authorize any of his representatives, a sheriff or deputy to levy upon, seize and sell any nonexempt property belonging to any person liable for the amounts secured by the lien.

(4) When a warrant is issued by the department for the collection of any amount due pursuant to a lien authorized by this chapter, it shall be directed to any authorized representative of the department, or to any sheriff or deputy, and any such warrant shall have the same force and effect as a writ of execution. It may be levied and sale made pursuant to it in the same manner and with the same force and effect as a levy and sale pursuant to a writ of execution. Upon the completion of his services pursuant to said warrant, the sheriff or deputy shall receive the same fees and expenses as are provided by law for services related to a writ of execution. All such fees and expenses shall be an obligation of the person liable for the amounts due and shall be collected from such person by virtue of the warrant. Any warrant issued by the director shall contain, at a minimum, the name and address of the liable person; the nature of the underlying liability; the date the liability was incurred; the amount of the liability secured by the lien; the amount of any penalty, interest or other amount due under the lien; and the interest rate on the lien.

(5) Whenever any property that is seized and sold by virtue of the foregoing provisions is not sufficient to satisfy the claim of the state for which seizure is made, any other property subject to seizure shall be seized and sold until the amount due from such person, together with all expenses, is fully paid.

(6) All persons are required, on demand of a representative of the department, a sheriff or deputy acting pursuant to this chapter, to produce all documentary evidence and statements relating to the property or rights in the property subject to seizure. [I.C., § 72-1360A, as added by 1997, ch. 205, § 7, p. 607; am. 1998, ch. 1, § 78, p. 3.]

#### STATUTORY NOTES

**Effective Dates.** — For effective date of this section, see Effective Date notes, § 72-1369.

**72-1361. Appeals to the department and to the commission.** — Upon appeal from a denial of a claim for refund or credit, determination of amounts due upon failure to report, determination of rate of contribution, determination of coverage, determination of chargeability, or jeopardy determination, the director may transfer the appeal directly to an appeals examiner pursuant to section 72-1368(6), Idaho Code, or he may issue a redetermination affirming, reversing or modifying the initial determination. A redetermination shall become final unless, within fourteen (14) days after



notice as provided in section 72-1368(5), Idaho Code, an appeal is filed by an interested party with the department in accordance with the department's rules. Appeal procedures shall be governed by the provisions of section 72-1368(6), (7), (8), (9) and (11), Idaho Code. The party appealing shall have the burden of proving each issue appealed by clear and convincing evidence. The provisions of the Idaho administrative procedure act, chapter 52, title 67, Idaho Code, regarding contested cases and judicial review of contested cases are inapplicable to proceedings involving interested employers under this chapter. [1947, ch. 269, § 61, p. 793; am. 1949, ch. 144, § 61, p. 252; am. 1961, ch. 294, § 2, p. 517; am. 1965, ch. 203, § 6, p. 456; am. 1989, ch. 57, § 6, p. 78; am. 1992, ch. 263, § 59, p. 783; am. 1998, ch. 1, § 79, p. 3.]

### STATUTORY NOTES

**Cross References.** — Claims for benefits and appellate procedure, § 72-1368.

**Compiler's Notes.** — Section 60 of S.L. 1992, ch. 263 read:

"(1) Prior to May 1, 1993, every agency shall deposit with the coordinator a copy, either in printed or electronic media form as the coordinator may prescribe, together with a proper index, certified by the executive officer, chairman or secretary of the agency, of all administrative rules adopted by the agency which are in effect or which will be in effect on July 1, 1993, in default of which such administrative rules shall become invalid.

(2) Idaho administrative rules as published shall be the codification specified in section 67-5204, Idaho Code. Publication of administrative rules may be commenced by the publication of individual titles or parts thereof of the manuscripts of administrative rules heretofore filed with the state law library. Except as otherwise provided in this section, such manuscripts of rules, as so amended and

supplemented, shall be deemed the initial agency text of such rules for the purposes of this act."

Section 61 of S.L. 1992, ch. 263 read:

"(1) Subsection (1) of section 60 of this act shall be in full force and effect on and after July 1, 1992, and additionally, the state auditor is authorized to appoint an administrative rules coordinator as soon as practical after July 1, 1992, and to declare such other sections of this act in full force and effect prior to July 1, 1993, as is necessary to effect an orderly publication of bulletins and the administrative code as soon after July 1, 1993, as possible.

(2) All other sections of this act shall be in full force and effect on and after July 1, 1993. Any rules and regulations in effect on June 30, 1993, and rules which are promulgated between July 1, 1993, and the publication of the Idaho administrative code, shall be in full force and effect until such administrative rules are published by the coordinator."

### JUDICIAL DECISIONS

#### Rehearing.

The board under its granted broad powers was clearly authorized to rehear the entire controversy of the determination by the chief of contributions that the involved corporation was ineligible for reduced contribution rate, to make its own findings of fact and draw its

own conclusions and was not limited to questions of law. In re Markham's, Inc., 79 Idaho 307, 316 P.2d 553 (1957).

**Cited in:** State v. Concrete Processors, Inc., 85 Idaho 277, 379 P.2d 89 (1963); Link's Sch. of Bus. v. Emp. Sec. Agency, 85 Idaho 519, 380 P.2d 506 (1963).

**72-1362. Liability of successor.** — Any person, whether or not a covered employer, who acquires the organization, trade, or business or a substantial part of the assets thereof, from a covered employer, shall be liable, in an amount not to exceed the reasonable value of the organization, trade, business, or assets acquired, for any contributions or penalties due or accrued and unpaid by such covered employer, and the amount of such liability shall, in addition, be a lien against the property or assets so acquired which shall be prior to all other liens; provided, that the lien shall

not be valid against one who acquires from the said predecessor any interest in the said property or assets in good faith, for value and without notice of the lien. The director shall, upon written request therefor, and with permission of the owner, furnish such prospective purchaser with a written statement of the amount of contributions and penalties due or accrued and unpaid by the said covered employer as of the date of such acquisition, and the amount of the liability of the successor or the amount of the said lien shall in no event exceed the liability disclosed by such statement. The foregoing remedies shall be in addition to all other existing remedies against the covered employer or his successor. [1947, ch. 269, § 62, p. 793; am. 1949, ch. 144, § 62, p. 252; am. 1998, ch. 1, § 80, p. 3.]

#### JUDICIAL DECISIONS

**Cited in:** Appeal of MacKenzie Auto. Equip. Co., 71 Idaho 362, 232 P.2d 130 (1951).

**72-1363. Contributions deductible from taxable income. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which 1949, ch. 144, § 63, p. 252, was repealed by comprised 1947, ch. 269, § 63, p. 793; am. S.L. 1998, ch. 1, § 81, effective July 1, 1998.

**72-1364. Uncollectible accounts.** — (1) The director may enter into agreements of compromise with employers with respect to amounts due under this chapter when it is determined by the director that the employer is unable to make full payment.

(2) Amounts due under this chapter, which are uncollected three (3) years after they become due, may be deemed uncollectible by the director if there is no likelihood of collection at a future date. [1947, ch. 269, § 64, p. 793; am. 1949, ch. 144, § 64, p. 252; am. 1989, ch. 57, § 7, p. 78; am. 1998, ch. 1, § 82, p. 3.]

**72-1365. Payment of benefits.** — (1) Benefits shall be paid from the employment security fund to any unemployed individual who is eligible for benefits as provided by section 72-1366, Idaho Code.

(2) Periodically, the department of health and welfare, bureau of child support enforcement, shall forward to the director a list containing the full name and social security number of persons from whom it is seeking child support. The director shall match the names and social security numbers on the list with its records of individuals eligible for benefits, and shall notify the department of health and welfare, bureau of child support enforcement, of the address and amount of benefits due each individual.

(a) Voluntary withholding. The director shall deduct and withhold from any benefits payable to an individual that owes child support obligations as defined under paragraph (g) of this subsection, the amount specified by the individual to the director to be deducted and withheld under this subsection, if paragraph (b) of this subsection below is not applicable.



(b) Involuntary withholding. The director shall withhold any benefits of any person within the limits established by section 11-207, Idaho Code, upon notification and order by the department of health and welfare, bureau of child support enforcement, to collect any delinquent child support obligation which has been assigned on behalf of any individual to the department of health and welfare under sections 56-203A and 56-203B, Idaho Code, or a child support obligation which the department seeks to collect pursuant to chapter 12, title 7, Idaho Code. The set-off or withholding of any benefits of a claimant shall become final after the following conditions have been met:

- (i) The child support payment to be set-off or withheld is a child support obligation established by order as defined in section 7-1202, Idaho Code.
- (ii) All liabilities owed by reason of the provisions of section 72-1369, Idaho Code, have been collected by the director.
- (iii) Notice of the set-off or withholding has been mailed by registered or certified mail from the department of health and welfare, bureau of child support enforcement, to the claimant-obligor at the address listed on the claim.

Within fourteen (14) days after such notice has been mailed (not counting Saturday, Sunday, or state holidays as the 14th day), the claimant-obligor may file a protest in writing, requesting a hearing before the department of health and welfare to determine his liability to the obligee. The hearing, if requested, shall be held within thirty-five (35) days from the date of the initial notice to the claimant-obligor of the proposed set-off. No issues at that hearing may be considered which have been litigated previously. The department of health and welfare shall issue its findings and decision either at the hearing or within ten (10) days of the hearing by mail to the claimant-obligor.

(iv) In its decision, the department of health and welfare may order the withholding and set-off of any subsequent benefits which may be due the claimant-obligor until the debt for which set-off is sought and any additional debts which are incurred by the claimant's failure to make additional periodic payments based upon the same court order are satisfied.

(c) Any amount deducted and withheld under paragraph (a) or (b) of this subsection shall be paid by the director to the appropriate state or local child support enforcement agency.

(d) Any amount deducted and withheld under paragraph (a) or (b) of this subsection shall for all purposes be treated as if it were paid to the individual as benefits and paid by such individual to the state or local child support enforcement agency in satisfaction of the individual's child support obligations.

(e) For purposes of paragraphs (a) through (d) of this subsection, the term "benefits" means any compensation payable under this chapter, including amounts payable by the director pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

(f) This section applies only if appropriate arrangements have been made for reimbursement by the state or local child support enforcement agency

for the administrative costs incurred by the director under the provisions of this section which are attributable to child support obligations being enforced by the state or local child support enforcement agency.

(g) The term "child support obligation" is defined for the purposes of these provisions as including only an obligation which is being enforced pursuant to a plan described in section 454 of the social security act which has been approved by the secretary of health and human services under part D of title IV of the social security act.

(h) The term "state or local child support enforcement agency" as used in these provisions means any agency of this state or a political subdivision thereof operating pursuant to a plan described in paragraph (g) of this subsection.

(3) Benefits shall be paid only to the extent that moneys are available for such payments in the employment security fund.

(4) Benefits shall be paid not less frequently than biweekly.

(5) Upon request, the department of health and welfare, bureau of child support enforcement, shall make the procedures established in this section for collecting child support available to county prosecuting attorneys. The provisions of this subsection apply only if appropriate arrangements have been made for reimbursement by the requesting prosecuting attorney for the administrative costs incurred by the bureau, which are attributable to the request.

(6)(a) An individual filing a new claim for benefits shall, at the time of filing such claim, be advised that:

(i) Benefits are subject to federal and state tax and requirements exist pertaining to estimated tax payments;

(ii) The individual may elect to have federal income tax deducted and withheld from the individual's benefits at the amount specified in the federal internal revenue code;

(iii) The individual shall be permitted to change a previously elected withholding status once during each benefit year.

(b) Amounts deducted and withheld from benefits shall remain in the unemployment fund until transferred to the taxing authority as a payment of income tax.

(c) The director shall follow all procedures specified by the United States department of labor and the federal internal revenue service pertaining to the deducting and withholding of income tax.

(d) Amounts shall not be deducted and withheld under this subsection until the following deductions are made and withheld in the following order:

(i) First, amounts owed for overpayments of benefits deducted and withheld pursuant to the provisions of section 72-1369, Idaho Code;

(ii) Second, amounts owed for child support obligations deducted and withheld pursuant to the provisions of subsection (2) of this section.

(e) At the director's discretion, the director may promulgate rules allowing individuals to elect to have state income tax deducted and withheld from the individual's payment of benefits. [I.C., § 72-212, as added by 1971, ch. 124, § 3, p. 422; am. 1972, ch. 20, § 1, p. 26; am. 1972, ch. 186,



§ 1, p. 473; am. 1974, ch. 94, § 1, p. 1193; am. 1976, ch. 285, § 1, p. 985; am. 1979, ch. 132, § 1, p. 426; am. 1981, ch. 190, § 2, p. 335; am. 1982, ch. 176, § 1, p. 464; am. 1982, ch. 244, § 1, p. 631; am. 1985, ch. 159, § 6, p. 417; am. 1986, ch. 221, § 2, p. 584; am. 1990, ch. 353, § 2, p. 946; am. 1994, ch. 293, § 14, p. 916; am 1996, ch. 62, § 3, p. 180; am. 1998, ch. 1, § 83, p. 3.]

### STATUTORY NOTES

**Cross References.** — Personal eligibility conditions, § 72-1366.

**Federal References.** — Section 454 of the Social Security Act, referred to herein is compiled as 42 U.S.C. § 654. Part D of Title IV of that act is compiled as 42 U.S.C. §§ 651-662.

**Compiler's Notes.** — The words in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 4 of S.L. 1996, ch. 62 provided that § 3 (this section) of the act shall be in full force and effect on and after January 1, 1997.

### JUDICIAL DECISIONS

#### **Persons Entitled to Benefits.**

Shoe salesman who frequently left work during the day and did not report for work on other occasions and who was discharged was not entitled to employment benefits since he was guilty of misconduct and left his employment voluntarily without just cause, as fund

must be protected to take care of employees who are without jobs in time of general unemployment. *Doran v. Employment Sec. Agency*, 75 Idaho 94, 267 P.2d 628 (1954).

**Cited in:** *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982); *Ewins v. Allied Sec.*, 138 Idaho 343, 63 P.3d 469 (2003).

**72-1366. Personal eligibility conditions.** — The personal eligibility conditions of a benefit claimant are that:

(1) The claimant shall have made a claim for benefits and provided all necessary information pertinent to eligibility.

(2) The claimant shall have registered for work and thereafter reported to a job service office or other agency in a manner prescribed by the director.

(3) The claimant shall have met the minimum wage requirements in his base period as provided in section 72-1367, Idaho Code.

(4) During the whole of any week with respect to which he claims benefits or credit to his waiting period, the claimant was:

(a) Able to work, available for suitable work, and seeking work; provided, however, that no claimant shall be considered ineligible for failure to comply with the provisions of this subsection if: (i) such failure is due to the claimant's illness or disability which occurs after he has filed a claim and during such illness or disability, the claimant does not refuse or miss suitable work that would have provided wages greater than one-half (1/2) of the claimant's weekly benefit amount; or (ii) such failure is due to compelling personal circumstance, provided that such failure does not exceed a minor portion of the claimant's workweek and during which time the claimant does not refuse or miss suitable work that would have provided wages greater than one-half (1/2) of the claimant's weekly benefit amount; and

(b) Living in a state, territory, or country that is included in the interstate benefit payment plan or that is a party to an agreement with the United States or the director with respect to unemployment insurance.

(5) The claimant's unemployment is not due to the fact that he left his employment voluntarily without good cause connected with his employment, or that he was discharged for misconduct in connection with his employment.

(6) The claimant's unemployment is not due to his failure without good cause to apply for available suitable work or to accept suitable work when offered to him. The longer a claimant has been unemployed, the more willing he must be to seek other types of work and accept work at a lower rate of pay.

(7) In determining whether or not work is suitable for an individual, the degree of risk involved to his health, safety, morals, physical fitness, experience, training, past earnings, length of unemployment and prospects for obtaining local employment in his customary occupation, the distance of the work from his residence, and other pertinent factors shall be considered. No employment shall be deemed suitable and benefits shall not be denied to any otherwise eligible individual for refusing to accept new work or to hold himself available for work under any of the following conditions:

- (a) If the vacancy of the position offered is due directly to a strike, lockout, or other labor dispute;
- (b) If the wages, hours, or other conditions of the work offered are below those prevailing for similar work in the locality of the work offered;
- (c) If, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(8) No claimant who is otherwise eligible shall be denied benefits for any week due to an inability to comply with the requirements contained in subsections (4) and (6) of this section, if:

- (a) The claimant is a participant in a program sponsored by title I of the workforce investment act and attends a job training course under that program; or
- (b) The claimant attends a job training course authorized pursuant to the provisions of section 236(a)(1) of the trade act of 1974 or the North American free trade agreement implementation act.
- (c) The claimant lacks skills to compete in the labor market and attends a job training course with the approval of the director. The director may approve job training courses that meet the following criteria:
  - (i) The purpose of the job training is to teach the claimant skills that will enhance the claimant's opportunities for employment; and
  - (ii) The job training can be completed within one (1) year, except that this requirement may be waived pursuant to rules that the director may prescribe.

This subsection shall apply only if the claimant submits with each claim report a written certification from the training facility that the claimant is attending and satisfactorily completing the job training course, or demonstrates good cause for failure to attend the job training.

(9) No claimant who is otherwise eligible shall be denied benefits under subsection (5) of this section for leaving employment to attend job training pursuant to subsection (8) of this section, provided that the claimant



obtained the employment after enrollment in or during scheduled breaks in the job training course, or that the employment was not suitable. For purposes of this subsection, the term "suitable employment" means work of a substantially equal or higher skill level than the individual's past employment, and wages for such work are not less than eighty percent (80%) of the average weekly wage in the individual's past employment.

(10) A claimant shall not be eligible to receive benefits for any week with respect to which it is found that his unemployment is due to a labor dispute; provided, that this subsection shall not apply if it is shown that:

(a) The claimant is not participating, financing, aiding, abetting, or directly interested in the labor dispute; and

(b) The claimant does not belong to a grade or class of workers with members employed at the premises at which the labor dispute occurs, who are participating in or directly interested in the dispute.

(11) A claimant shall not be entitled to benefits for any week with respect to which or a part of which he has received or is seeking benefits under an unemployment insurance law of another state or of the United States; provided, that if the appropriate agency of such other state or of the United States shall finally determine that he is not entitled to such unemployment compensation or insurance benefits, he shall not by the provisions of this subsection be denied benefits. For purposes of this section, a law of the United States providing any payments of any type and in any amounts for periods of unemployment due to involuntary unemployment shall be considered an unemployment insurance law of the United States.

(12) A claimant shall not be entitled to benefits for a period of fifty-two (52) weeks if it is determined that he has willfully made a false statement or willfully failed to report a material fact in order to obtain benefits. The period of disqualification shall commence the week the determination is issued. The claimant shall also be ineligible for waiting week credit and shall repay any sums received for any week for which the claimant received waiting week credit or benefits as a result of having willfully made a false statement or willfully failed to report a material fact. The claimant shall also be ineligible for waiting week credit or benefits for any week in which he owes the department an overpayment, civil penalty, or interest resulting from a determination that he willfully made a false statement or willfully failed to report a material fact.

(13) A claimant shall not be entitled to benefits if his principal occupation is self-employment.

(14) A claimant who has been found ineligible for benefits under the provisions of subsection (5), (6), (7) or (9) of this section shall reestablish his eligibility by having obtained bona fide work and received wages therefor in an amount of at least fourteen (14) times his weekly benefit amount.

(15) Benefits based on service in employment defined in sections 72-1349A and 72-1352(3), Idaho Code, shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this act.

(a) If the services performed during one-half (1/2) or more of any contract period by an individual for an educational institution as defined in section

72-1322B, Idaho Code, are in an instructional, research, or principal administrative capacity, all the services shall be deemed to be in such capacity.

(b) If the services performed during less than one-half (1/2) of any contract period by an individual for an educational institution are in an instructional, research, or principal administrative capacity, none of the service shall be deemed to be in such capacity.

(c) As used in this section, "contract period" means the entire period for which the individual contracts to perform services, pursuant to the terms of the contract.

(16) No claimant is eligible to receive benefits in two (2) successive benefit years unless, after the beginning of the first benefit year during which he received benefits, he performed service and earned an amount equal to not less than six (6) times the weekly benefit amount established during the first benefit year.

(17)(a) Benefits based on wages earned for services performed in an instructional, research, or principal administrative capacity for an educational institution shall not be paid for any week of unemployment commencing during the period between two (2) successive academic years, or during a similar period between two (2) terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual who performs such services in the first academic year (or term) and has a contract to perform services in any such capacity for any educational institution in the second academic year or term, or has been given reasonable assurance that such a contract will be offered.

(b) Benefits based on wages earned for services performed in any other capacity for an educational institution shall not be paid to any individual for any week which commences during a period between two (2) successive school years or terms if the individual performs such services in the first school year or term, and there is a contract or reasonable assurance that the individual will perform such services in the second school year or term. If benefits are denied to any individual under this paragraph (b) and the individual was not offered an opportunity to perform such services for the educational institution for the second academic year or term, the individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of this clause.

(c) With respect to any services described in paragraphs (a) and (b) of this subsection (17), benefits shall not be paid nor "waiting week" credit given to an individual for wages earned for services for any week which commences during an established and customary vacation period or holiday recess if the individual performed the services in the period immediately before the vacation period or holiday recess, and there is a reasonable assurance the individual will perform such services in the period immediately following such vacation period or holiday recess.

(d) With respect to any services described in paragraphs (a) and (b) of this subsection (17), benefits shall not be payable on the basis of services in



any capacities specified in paragraphs (a), (b) and (c) of this subsection (17) to any individual who performed such services in an educational institution while in the employ of an educational service agency. For purposes of this paragraph the term "educational service agency" means a governmental entity which is established and operated exclusively for the purpose of providing such services to one (1) or more educational institutions.

(18) Benefits shall not be payable on the basis of services which substantially consist of participating in sports or athletic events or training or preparing to participate, for any week which commences during the period between two (2) successive sport seasons (or similar periods) if the individual performed services in the first season (or similar period) and there is a reasonable assurance that the individual will perform such services in the later of such season (or similar period).

(19)(a) Benefits shall not be payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time the services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of sections 207 and 208 or section 212(d)(5) of the immigration and nationality act).

(b) Any data or information required of individuals applying for benefits to determine eligibility under this subsection shall be uniformly required from all applicants for benefits.

(c) A decision to deny benefits under this subsection must be based on a preponderance of the evidence.

(20) An individual who has been determined to be likely to exhaust regular benefits and to need reemployment services pursuant to a profiling system established by the director must participate in those reemployment services unless:

(a) The individual has completed such services; or

(b) There is justifiable cause, as determined by the director, for the claimant's failure to participate in such services.

(21)(a) A claimant:

(i) Who has been assigned to work for one (1) or more customers of a staffing service; and

(ii) Who, at the time of hire by the staffing service, signed a written notice informing him that completion or termination of an assignment for a customer would not, of itself, terminate the employment relationship with the staffing service;

will not be considered unemployed upon completion or termination of an assignment until such time as he contacts the staffing service to determine if further suitable work is available. If the claimant:

(A) Contacts the staffing service and refuses a suitable work assignment that is offered to him at that time, he will be considered to have voluntarily quit that employment; or

(B) Contacts the staffing service and the service does not have a suitable work assignment for him, he will be considered unemployed due to a lack of work; or

(C) Accepts new employment without first contacting the staffing service for additional work, he will be considered to have voluntarily quit employment with the staffing service.

(b) For the purposes of this subsection, the term "staffing service" means any person who assigns individuals to work for its customers and includes, but is not limited to, professional employers, as defined in chapter 24, title 44, Idaho Code, and the employers of temporary employees as defined in section 44-2403(7), Idaho Code. [1947, ch. 269, § 66, p. 793; am. 1949, ch. 144, § 66, p. 252; am. 1951, ch. 235, § 4, p. 472; am. 1955, ch. 18, § 9, p. 20; am. 1959, ch. 51, § 1, p. 107; am. 1961, ch. 294, § 3, p. 517; am. 1963, ch. 271, § 1, p. 691; am. 1965, ch. 170, § 5, p. 331; am. 1969, ch. 57, § 1, p. 197; am. 1971, ch. 341, § 1, p. 1328; am. 1972, ch. 344, § 4, p. 998; am. 1973, ch. 89, § 1, p. 146; am. 1974, ch. 102, § 1, p. 1204; am. 1975, ch. 47, § 1, p. 86; am. 1976, ch. 141, § 5, p. 517; am. 1977, ch. 179, § 16, p. 464; am. 1978, ch. 112, § 9, p. 232; am. 1979, ch. 110, § 2, p. 348; am. 1980, ch. 264, § 9, p. 682; am. 1982, ch. 295, § 1, p. 751; am. 1982, ch. 326, § 10, p. 807; am. 1983, ch. 146, § 6, p. 382; am. 1985, ch. 203, § 2, p. 506; am. 1986, ch. 22, § 1, p. 63; am. 1987, ch. 352, § 1, p. 780; am. 1989, ch. 57, § 8, p. 78; am. 1990, ch. 353, § 3, p. 946; am. 1992, ch. 192, § 1, p. 597; am. 1995, ch. 98, § 3, p. 289; am. 1997, ch. 271, § 2, p. 786; am. 1998, ch. 1, § 84, p. 3; am. 1999, ch. 53, § 1, p. 131; am. 2000, ch. 137, § 1, p. 359; am. 2005, ch. 5, § 13, p. 6; am. 2006, ch. 38, § 2, p. 105.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 38, in the third sentence of subsection (12), substituted "any week for" for "week in" and inserted "received waiting week credit or benefits as a result of having."

**Federal References.** — The workforce investment act, referred to in paragraph (8)(a), generally appears as 29 U.S.C. § 2801 et seq.

Section 236(a)(1) of the trade act of 1974, referred to in paragraph (8)(b), appears as 19 U.S.C. § 2296(a)(1).

The North America free trade agreement implementation act, referred to in paragraph (8)(b), generally appears as 19 U.S.C. § 3301 et seq.

Sections 207, 208, and 212(d)(5) of the immigration and nationality act, referred to in paragraph (19)(a), appears as 8 U.S.C. § 1157, 8 U.S.C. § 1158, and 8 U.S.C. § 1182(d)(5), respectively.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1965,

ch. 57 declared an emergency. Approved February 27, 1969.

Section 6 of S.L. 1965, ch. 170 provided the act should take effect and be in force on and after July 4, 1965.

Section 2 of S.L. 1975, ch. 47 declared an emergency. Approved March 14, 1975.

Section 3 of S.L. 1979, ch. 110 declared an emergency. Approved March 22, 1979.

Section 3 of S.L. 1985, ch. 203 declared an emergency. Approved March 22, 1985.

Section 15 of S.L. 1971, ch. 142 provided the act should take effect from and after January 1, 1972.

Section 3 of S.L. 1971, ch. 341 provided the act should be in full force and effect with benefit years beginning on and after July 4, 1971.

Section 2 of S.L. 2000, ch. 137 provided that the act shall be in full force and effect on and after July 1, 2000.

Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

Section 5 of S.L. 2006, ch. 38 declared an emergency. Approved March 11, 2006.



## JUDICIAL DECISIONS

## ANALYSIS

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 Standards for eligibility.  
 Suitable work.  
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 Termination as a result of resignation.  
 Validity of IDAPA regulation.  
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**Appeals.**

Findings of board are not conclusive on appeal if board does not hear or see the witnesses. *Mandes v. Employment Sec. Agency*, 74 Idaho 23, 255 P.2d 1049 (1953).

The condition of claimant's health and ability to work is a question of fact for the industrial accident board whose finding based on substantial and competent evidence will not be disturbed on review. *Wolfgram v. Employment Sec. Agency*, 77 Idaho 298, 291 P.2d 279 (1955); *Turner v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956); *Ankrum v. Employment Sec. Agency*, 83 Idaho 274, 361 P.2d 795 (1961); *Ramsey v. Employment Sec. Agency*, 85 Idaho 395, 379 P.2d 797 (1963);

*Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1963); *Czarlinsky v. Employment Sec. Agency*, 87 Idaho 65, 390 P.2d 822 (1964).

Insofar as the finding of the industrial accident board reverses the determination of the examiners that claimant, a federal employee, resigned, they were in error but the findings do support the conclusion that claimant resigned for good cause, therefore since the final judgment or order of the lower tribunal was correct but entered upon an erroneous theory, the judgment or order will be confirmed by the appellate court upon the correct theory. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963).

On appeal from decisions of the industrial commission, the scope of review is limited to questions of law, and the commission's findings of fact will not be disturbed on appeal when they are supported by substantial though conflicting evidence. *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89 (1979).

Where a second hearing's examiner and the industrial commission lacked the power to adjudicate the issue of a claimant's alleged fabrication, the orders of the industrial commission would be reversed and remanded for further proceedings. *Luskin v. Department of Emp.*, 100 Idaho 584, 602 P.2d 947 (1979).

#### **Availability for Work.**

Availability test is met by claimant if he shows he is able, ready, and willing to accept and is seeking suitable work at a point where an available labor market exists. *Eytchison v. Employment Sec. Agency*, 77 Idaho 448, 294 P.2d 593 (1956); *Ellis v. Employment Sec. Agency*, 83 Idaho 95, 358 P.2d 396 (1961); *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954).

Claimant was not available for work where he left large city in favor of a small town where labor opportunities were practically nonexistent. *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954).

Claimant was not required to refund payments received for unemployment after leaving large city and moving to small town where he stated in claim that he was available for work and was looking for work even though subsequent claim was denied on the ground that he was not at a point where there was an available labor market, since claim on which he received payment was not received as the result of a misrepresentation of a material fact. *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954).

Logging superintendent, who was without work for a portion of the year due to the fact that logging was seasonal was available for work even though he also was president of a lumber corporation, where duties as president did not prevent him from doing logging work. *Eytchison v. Employment Sec. Agency*, 77 Idaho 448, 294 P.2d 593 (1956).

The Employment Security Act is social legislation, designed to alleviate economic insecurity and to relieve hardships resulting from involuntary unemployment. It was intended to provide benefits for those unemployed under prescribed conditions who are willing and able to work but unable to secure a suitable employment on the labor market. *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

The board and the appeals examiner were required to decide whether the claimant met the requirements of availability for suitable

work. In *re Walker's Claim*, 80 Idaho 420, 332 P.2d 199 (1958).

This section directs that many factors shall be considered in determining whether or not work is suitable for an individual, and in addition to the specified factors it provides "and other pertinent factors shall be considered," thus making it clear that the legislative intent is that all factors, in order to do justice to the applicant in keeping with the spirit of the act, shall be considered. *Johnson v. Employment Sec. Agency*, 81 Idaho 560, 347 P.2d 764 (1959).

Availability for work requires no more than availability for suitable work which the claimant has no good cause for refusing. *Johnson v. Employment Sec. Agency*, 81 Idaho 560, 347 P.2d 764 (1959).

Where claimant was able to work, available for suitable work, and seeking work, suitable work was not offered and refused when claimant was told by his supervisor that he could not perform job, the distance to work was thirty miles, and the claimant was sixty-eight years of age. *Johnson v. Employment Sec. Agency*, 81 Idaho 560, 347 P.2d 764 (1959).

Subdivision i(3) [now (7)(c)] of this statute has application only to conditions imposed by the prospective employer, and is not applicable to conditions imposed by prospective employee or his labor union. *Norman v. Employment Sec. Agency*, 83 Idaho 1, 356 P.2d 913 (1960).

A claimant may render himself unavailable for work by imposing conditions and limitations as to employment so as to bar his recovery of unemployment compensation since willingness to be employed conditionally does not meet the test of availability. *Ellis v. Employment Sec. Agency*, 83 Idaho 95, 358 P.2d 396 (1961).

An ex-service man who spent his time since his discharge from the navy traveling between his home in Idaho and San Francisco and Los Angeles, inquiring about and seeking to expedite the shipment of his car from Hawaii, awaiting the arrival of his car, returning a car borrowed from a relative, and vainly seeking interviews for data managing employment or in interviews for such employment with employers who considered him unqualified because of lack of background training was not available for employment within the meaning of this section. *Kirkbride v. Department of Emp.*, 91 Idaho 658, 429 P.2d 390 (1967).

Applicant, who was laid off from his warehouseman's job, although always ready and willing to return to work, and who started remodeling a building he purchased in the future hope of opening a restaurant was found not to be self employed. *Corwin v. Sunshine Mining Co.*, 96 Idaho 211, 525 P.2d 993 (1974).



Where a stand-by employee sought out and accepted full-time employment but requested and received permission to start such work one night later than planned, the employee did not refuse without good cause to accept available work or voluntarily quit work, nor could he be accused of misconduct barring him from receiving unemployment compensation. *White v. Idaho Forest Indus.*, 98 Idaho 784, 572 P.2d 887 (1977).

This section has been amended 17 times since 1947, and certain exceptions to the requirement of availability for work have been added, but the exception permitted in the case of illness has never been amended to make it more liberal in scope. *Howard v. Department of Emp.*, 100 Idaho 314, 597 P.2d 37 (1979).

Where a claimant would not accept a reduction in pay in excess of six percent of her prior earnings, after a lengthy period of unemployment, the commission was entitled to conclude that such a self-imposed restriction operated in favor of ineligibility. *Guillard v. Department of Emp.*, 100 Idaho 647, 603 P.2d 981 (1979).

The general rule appears to be that student-claimants who are held eligible for unemployment benefits are those who place availability for work ahead of their schooling and demonstrate a willingness to change class schedules or drop out of school if job conflict makes such necessary. The demonstrated inquiry is whether the claimant is genuinely attached to the labor market or principally interested in obtaining an education. *Davenport v. State, Dep't of Emp.*, 103 Idaho 492, 650 P.2d 634 (1982).

Where the undisputed evidence showed that the claimant had worked as a waitress and a factory worker for 20 years, that she had been working from 22 to 52 hours a week at two jobs when she was terminated from one job, that she did not indicate to potential employers that she was attending college classes, that she had stated her willingness to quit school or drop conflicting classes if necessary to obtain a new job, and that she had continued to work in her second job, the claimant demonstrated her attachment to the work force and her part-time college attendance did not render her unavailable for work. *Davenport v. State, Dep't of Emp.*, 103 Idaho 492, 650 P.2d 634 (1982).

Even though claimant was unable to work, unavailable for suitable work, and not seeking work during period he was hospitalized, he was still eligible for benefits since the disability took place after he had begun to receive benefits and no suitable work was available during the period of disability. *Artis v. Morrison-Knudsen Co.*, 107 Idaho 1109, 695 P.2d 1248 (1985).

### **Burden of Proof.**

Burden is on the employee to show he had good cause for quitting employment. *Roby v. Potlatch Forests, Inc.*, 74 Idaho 404, 263 P.2d 553 (1953).

Burden of proof is on claimant to show that he is available for work. *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954).

Claimant, a carpenter, upon termination of his employment by reason of the completion of the project, filed claim for unemployment benefits and was thereafter paid benefits. Excluding a short employment interval and vacation period, the unemployed carpenter commenced constructing a dwelling on two lots he owned, during his spare time while unemployed and such was held to be an increment of his estate equal to, if not greater than, the wages he would have been required to pay other artisans to work for him and he was held fully employed and receiving actual wages, and therefore not entitled to compensation benefits, but since he had received them in good faith was not required to repay benefits received. *Hatch v. Employment Sec. Agency*, 79 Idaho 246, 313 P.2d 1067 (1957).

The burden was upon the claimant to show he had complied with the requirements of the employment security act, that is, that he was (1) able to work, (2) available for suitable work, and (3) seeking work. In re Walker's Claim, 80 Idaho 420, 332 P.2d 199 (1958); *Ellis v. Employment Sec. Agency*, 83 Idaho 95, 358 P.2d 396 (1961).

Burden was on claimant to prove that she had met all of the requirements and conditions of eligibility for benefit payments. *Bean v. Employment Sec. Agency*, 81 Idaho 551, 347 P.2d 339 (1959); *Norman v. Employment Sec. Agency*, 83 Idaho 1, 356 P.2d 913 (1960); *Ankrum v. Employment Sec. Agency*, 83 Idaho 274, 361 P.2d 913 (1961); *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1961); *Burroughs v. Employment Sec. Agency*, 86 Idaho 412, 387 P.2d 473 (1963); *Boodry v. Eddy Bakeries Co.*, 88 Idaho 165, 397 P.2d 256 (1964).

Involuntary restrictions, such as age, do not place a greater burden upon a claimant in establishing his eligibility; the only requirements are that a claimant must be (1) able to work; (2) available for suitable work; and (3) seeking work. *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1963).

Where employer countered with testimony that the 10th of the month was the only pay day during the month but the 25th day constituted an "advance" day on which an employee could request, and at the discretion of the employer, receive an advance on his salary and where the record disclosed no such request on the 25th was made by the claimant, the claimant failed to carry his burden of showing his voluntary termination of employ-

ment upon good cause. *Toland v. Schneider*, 94 Idaho 556, 494 P.2d 154 (1972).

Where the wages earned by claimant, found by the board to be \$295 for eight working days, produced an average of \$37.00 per day, which was not shown by the record to be an unduly low wage as compared to the average sawyer's wage in that area during that time of year, a claim of low wages did not meet the burden of proof to show that claimant's voluntary termination of employment was based upon good cause. *Toland v. Schneider*, 94 Idaho 556, 494 P.2d 154 (1972).

Claimant for unemployment compensation has the burden of proving "good cause" for voluntarily terminating his employment. *Toland v. Schneider*, 94 Idaho 556, 494 P.2d 154 (1972); *Flynn v. Amfac Foods, Inc.*, 97 Idaho 768, 554 P.2d 946 (1976); *Rogers v. Trim House*, 99 Idaho 746, 588 P.2d 945 (1979).

The burden of proving and establishing statutory eligibility for unemployment benefits rests with a claimant. *Pyeatt v. Idaho State Univ.*, 98 Idaho 424, 565 P.2d 1381 (1977).

Where a claimant voluntarily terminates employment, that claimant bears the burden of establishing "good cause" with respect to the statutory requirement that a claimant's unemployment is not due to quitting without good cause. *Pyeatt v. Idaho State Univ.*, 98 Idaho 424, 565 P.2d 1381 (1977).

The burden of establishing eligibility for unemployment compensation benefits is on the claimant whenever the claim is questioned. *Guillard v. Department of Emp.*, 100 Idaho 647, 603 P.2d 981 (1979).

When a claimant's eligibility for unemployment compensation benefits is challenged by the employer on the ground that the employment was terminated for misconduct, the employer must carry the burden of proving that the employee was in fact discharged for employment-related misconduct. *Parker v. St. Maries Plywood*, 101 Idaho 415, 614 P.2d 955 (1980); *Roll v. City of Middleton*, 105 Idaho 22, 665 P.2d 721 (1983).

Where the check which the claimant submitted as proof that he had performed services subsequent to June 17, 1984, the beginning of his first benefit year, stated that it was for services rendered from "1985-1990," the check on its face indicated that at least some portion thereof was to be considered wages for future and as yet unrendered services, and where in addition the claimant's own testimony was that the check represented either past or future wages, the record supported the industrial commission's decision that the claimant failed in his burden of proof that he had rendered services of the requisite value. *Madsen v. Idaho Dep't of Transp.*, 112 Idaho 104, 730 P.2d 1024 (1986).

The claimant bears the burden of showing

that he has satisfied all of the eligibility requirements. *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 739 P.2d 339 (1987).

The burden of proving discharge is on the claimant, and only if the claimant proves discharge does the employer have the burden of proving misconduct. *Johnson v. Idaho Cent. Credit Union*, 127 Idaho 867, 908 P.2d 560 (1995).

The burden of proving employment-related misconduct lies with the employer. *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 933 P.2d 642 (1997).

In the case of a claim where the putative employer disputes that a worker was engaged in covered employment, covered employment cannot be assumed and the worker must show engagement in covered employment as part of the claim for benefits. *Beale v. State, Dep't of Emp.*, 131 Idaho 37, 951 P.2d 1264 (1997).

Because the employee voluntarily quit his employment with his employer, he had the burden of proving that good cause existed for him to do so; the Idaho industrial commission decision, supported by substantial and competent evidence, was that the employee had failed to prove that he had good cause to quit his employment because he failed to provide the employer or the Idaho department of labor with sufficient medical evidence exhibiting the degree of risk to his health or physical condition while the record remained open. *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 67 P.3d 1265 (2003).

### **Commission's Indecision.**

Where claimant was laid off from his employment during a time when his employer was selling the business and the buyer had made no specific offer of employment before or after claimant was involuntarily laid off, claimant was eligible for unemployment benefits irrespective of the commission's indecision as to whose experience rating should be charged as a result of the compensation paid for claimant's unemployment. *Tackett v. Continental College of Beauty*, 96 Idaho 634, 534 P.2d 464 (1975).

### **Communication of Employment Requirements.**

Where the defendant clearly communicated its rule that being at work with "any detectable level of alcohol or drugs in the body" would constitute a violation of its drug policy and could result in discharge, and where the plaintiff admitted that she had read, understood and signed that policy, defendant's "zero tolerance" rule was a reasonable expectation of the employment *Smith v. Zero Defects, Inc.*, 132 Idaho 881, 980 P.2d 545 (1999).

### **Constitutionality.**

It was permissible for this section to exclude daytime but not nighttime students



from eligibility for unemployment benefits, since the legislature could rationally conclude that daytime work is far more plentiful than nighttime work and that consequently daytime students restrict the range of jobs open to them; and the fact that the classification is imperfect because some daytime students actually find job opportunities more numerous at night does not invalidate the statute under U.S. Const., amend. XIV. Idaho Dep't of Emp. v. Smith, 434 U.S. 100, 98 S. Ct. 327, 54 L. Ed. 2d 324 (1977).

Since this section is worded in terms of "spouses" it is not unconstitutional as a denial of equal protection under U.S. Constitution or under Idaho const., art. I, § 13. Pyeatt v. Idaho State Univ., 98 Idaho 424, 565 P.2d 1381 (1977); Carlson v. Center of Resources for Indep. People, 109 Idaho 1053, 712 P.2d 1161 (1984).

This section did not unconstitutionally inhibit the right to travel of a claimant who terminated her previous employment in order to accompany her husband in a move to another locality. Pyeatt v. Idaho State Univ., 98 Idaho 424, 565 P.2d 1381 (1977).

#### **Construction.**

A fact is material within the meaning of this section if it is relevant to the determination of a claimant's right to benefits; it need not actually affect the outcome of that determination. Meyer v. Skyline Mobile Homes, 99 Idaho 754, 589 P.2d 89 (1979).

Although the role of distance ordinarily becomes an issue where employees commute on their own time and at their own expense between their homes and fixed work places, nothing in this section confines consideration of the distance factor to the commuter context. Meyer v. Skyline Mobile Homes, 99 Idaho 754, 589 P.2d 89 (1979).

Good cause to refuse employment may exist even where the work offered is suitable; otherwise the good cause language used by the legislature would become mere surplusage, contrary to general principles of statutory construction. Meyer v. Skyline Mobile Homes, 99 Idaho 754, 589 P.2d 89 (1979).

"Misconduct" which will disqualify a claimant from receiving unemployment benefits means, "wilful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of his employees." Weston v. Gritman Mem. Hosp., 99 Idaho 717, 587 P.2d 1252 (1978).

These two terms, "good cause" and "suitable," are not necessarily coextensive; a claimant always has good cause to refuse work that is unsuitable, but may also have good cause to refuse work that is suitable. Ullrich v. Thorpe Elec., 109 Idaho 820, 712 P.2d 521 (1985).

#### **Date of Termination.**

Where claimant voluntarily quit part-time employment as cafeteria worker because of pressure of maintaining academic grades, then filed for unemployment benefits two months later, industrial commission erred in utilizing time of application for benefits rather than time of termination of employment in granting benefits, since he was ineligible for benefits under this section at time of employment termination and he had not re-established his eligibility under subsection (l) [now (n)] of this section. Andersen v. Brigham Young Univ., 101 Idaho 737, 620 P.2d 310 (1980).

#### **Different Employment.**

Claimant, who after discharge from armed forces, was hired as a fire fighter and assigned duties as a member of "brush crew," was properly denied unemployment benefits where none of his contentions, that having spent two years in armed services he did not desire to be placed in a "barracks" atmosphere, that he felt the hourly pay was insufficient and that he felt that he was going to be "laid off" for part of winter in near future, were sufficient to require granting the benefits. McMunn v. Department of Public Lands, 94 Idaho 493, 491 P.2d 1265 (1971).

Where claimant refused to accept new conditions of employment offered him by employer which in essence, amounted to termination of claimant's job with employer and replacement by a new job with reduced pay and benefits, the new job being the result of employer's refusal to offer its employees wages and benefits equal to what either the expired or the new union agreement called for; the new job was a vacancy created by a labor dispute, and claimant's decision not to accept such work — statutorily defined by this section as unsuitable work — was with good cause, and claimant was entitled to benefits. Peters v. Drake Mechanical, 108 Idaho 610, 701 P.2d 230 (1985).

#### **Discharge for Misconduct.**

The term "discharged for misconduct" should be interpreted as meaning willful, intentional disregard of the employer's interest, a deliberate violation of the employer's rules, or a disregard of standards of behavior which the employer has a right to expect of his employees. Davis v. Howard O. Miller Co., 107 Idaho 1092, 695 P.2d 1231 (1984).

Because conduct may be so egregious that a fact finder may infer that it was wilful or intentional misconduct or that the conduct evidences a disregard of the employer's interest, and because it was clear that the basis of discharge of aviation worker who failed to get tower clearance before crossing runways was for violation of FAA and airport rules, and because there was substantial, competent ev-

idence to support industrial commission's finding of misconduct, claimant was properly denied unemployment benefits. *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 914 P.2d 564 (1996).

An employer may reasonably expect that employees not use vulgar language in the presence of other employees and customers during business hours in a retail establishment, particularly where the vulgarities show disrespect for the employer and its management. *Pimley v. Best Values, Inc.*, 132 Idaho 432, 974 P.2d 78 (1999).

When an employer discharges an employee, the worker is eligible for unemployment benefits if unemployment is not due to the fact that he left his employment voluntarily without good cause connected with his employment or that he was discharged for misconduct in connection with his employment; the burden of proving misconduct, by a preponderance of the evidence, falls strictly on the employer, and, where the burden is not met, benefits must be awarded to the claimant. *Harris v. Elec. Wholesale*, 141 Idaho 1, 105 P.3d 267 (2004).

Whether an employee's behavior, for which he was discharged, constituted misconduct, rendering him ineligible for unemployment insurance benefits, is a factual determination that will be upheld by an appellate court unless not supported by substantial and competent evidence. *Harris v. Elec. Wholesale*, 141 Idaho 1, 105 P.3d 267 (2004).

Employee was properly denied unemployment benefits where the employee violated a written standard of behavior of the center that the employer had a right to expect of him when he pre-completed a patient's chart, stating that he had given her morphine at 4:00 a.m. and 6:00 a.m., which could not have been done because the patient expired at 3:15 a.m. *Kivalu v. Life Care Ctrs. of Am.*, — Idaho —, 127 P.3d 165 (2005).

Worker, who failed a drug test, was not entitled to unemployment benefits because he had engaged in misconduct. Although the worker had smoked marijuana off the job, his employer's policies had been communicated to him, and his conduct off the job was substantially related to his employer's interests. *Desilet v. Glass Doctor*, — Idaho —, 132 P.3d 412 (2006).

### **Drug and Alcohol Policy.**

A manufacturer of highly technical electronic equipment had a right to expect its employees to refrain from conduct that could bring dishonor on its business, and its "zero tolerance" policy regarding drugs and alcohol was reasonably related to that interest. *Smith v. Zero Defects, Inc.*, 132 Idaho 881, 980 P.2d 545 (1999).

### **Eligibility Requirements.**

The question of whether a claimant has met the eligibility requirements of this section is a question of fact for the industrial commission to decide. *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 739 P.2d 339 (1987).

Whether an employee has quit or has been discharged is determined by asking whether the employer's actions or statements could reasonably be interpreted as discharged the claimant. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Whether claimant met the eligibility requirements of this section presented a question of fact over which the industrial commission had exclusive jurisdiction and needed to rule, applying the proper eligibility requirements, before court could act further. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 903 P.2d 90 (1995).

In order to be eligible for unemployment benefits, a claimant must be able to work, available for suitable work and seeking work and claimants will not be denied benefits they otherwise would be entitled to if the failure to be able to work, available for suitable work, and seeking work is due to an illness or disability which occurs after the claimant has filed a claim for benefits and registered for work. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 903 P.2d 90 (1995).

Part-time teacher was ineligible for unemployment compensation for the summer months between two school terms when she was given a reasonable assurance of employment in the following term, under subsection (17)(a). *Emery v. Boise State Univ.*, 136 Idaho 312, 32 P.3d 1112 (2001).

### **Employment at Will.**

The "employment at will" doctrine is applicable solely to actions for wrongful discharge, not to actions for unemployment compensation benefits. *Stevenson v. TR Video, Inc.*, 112 Idaho 1081, 739 P.2d 380 (1987).

### **Evidence.**

Where claimant assaulted president of company who was hospitalized for ten days as a result and commission determined that claimant was not eligible for benefits since he had been discharged for misconduct in connection with his employment, commission did not err when it made no specific finding of fact regarding tendered evidence of claimant that he, president and another were stockholders and owners of the company as such findings of fact were immaterial since a consideration of such evidence would have resulted in denial of benefits on basis that claimant was self-employed. *Levesque v. Hi-Boy Meats, Inc.*, 95 Idaho 808, 520 P.2d 549 (1974).

Evidence to support the findings of the commission that claimant had willfully failed to report earnings could be found in the fact



that the claimant was well aware of the regulations regarding unemployment insurance and would have realized he was not entitled to full compensation for weeks in which he had earned a total of \$390.23 and that the inaccurate certifications were filled out for two successive weeks. *Gaehring v. Department of Emp.*, 100 Idaho 118, 594 P.2d 628 (1979).

Where over the 20-week period in question during which claimant received benefits, he contacted at most 16 prospective employers, or less than one employer contact per week, and the claimant failed to keep a current list of employer contacts as required by the statute and his eligibility review agreement, the industrial commission's decision upholding the Department of Employment's determination of ineligibility was supported by substantial competent evidence. *Burnside v. Gate City Steel Corp.*, 112 Idaho 1040, 739 P.2d 339 (1987).

Where employer presented no evidence that employee was impaired while at work, nor was employee informed that use of controlled substances during non-working hours would violate employer's policy, there was no evidence that employee did not comply with employer's communicated substance abuse policy. *Merriott v. Shearer Lumber Prods.*, 127 Idaho 620, 903 P.2d 1317 (1995).

Where employee in order to continue employment was required to sign agreement which would have vitiated any claims that employee might have had against employer, such waiver of rights contained in the agreement constituted a condition of work offered which was substantially less favorable to the employee than those prevailing for similar work in the locality of the work offered and thus, Commission's conclusion that work offered was not suitable work, was based on substantial, competent evidence. *Crooks v. Inland 465 Ltd. Partnership*, 129 Idaho 43, 921 P.2d 743 (1996).

Substantial and competent evidence in the record supported the industrial commission's finding that claimant failed to explore reasonable alternatives prior to resigning. *Teevan v. Office of Att'y Gen.*, 130 Idaho 79, 936 P.2d 1321 (1997).

Substantial and competent evidence supported the Idaho industrial commission's finding that the employee did not face an imminent and substantial wage reduction at the time he left the employer. There was also substantial and competent evidence supporting the commission's finding that the employee failed to pursue any of the available options offered through the employer before quitting, such that the decision denying unemployment insurance benefits was proper. *Edwards v. Independence Servs.*, 140 Idaho 912, 104 P.3d 954 (2004).

### **Failure to Contact Employer.**

It was reasonable for employee to fail to contact his employer about his continued absence from work while undergoing intensive, in-patient treatment for employment related suicidal depression despite the fact that nearly a week passed without employee contacting his employer, under the unique circumstances of case, namely that, as a suicide risk, employee's access to a phone was somewhat restricted and he associated work with his severe emotional problems. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 903 P.2d 90 (1995).

### **Failure to Report Material Fact.**

The legislature intended to disqualify those claimants who purposely, intentionally, consciously or knowingly fail to report a material fact, not those whose omission is accidental because of negligence, misunderstanding or other cause; thus, where claimant received no compensation for the extra hours he volunteered, and felt he did not need to report them because they were not "material," but upon learning that the extra hours should have been reported, he reported them within a week to the Department of Employment, voluntarily and without being approached by the department, his initial failure to report such extra hours was not "willful," within the meaning of this section. *Smith v. State*, Dep't of Emp., 107 Idaho 625, 691 P.2d 1240 (1984).

The appeals examiner expressly found that applicant willfully failed to report material information to the Department of Employment in her application for unemployment benefits when she failed to complete item 8(c) of the continuing claim form. *Steffen v. Davison, Copple, Copple & Copple*, 120 Idaho 129, 814 P.2d 29 (1991).

### **Good Cause for Declining Work.**

Where the work offered was nonunion, the work was suitable but claimant had good cause to decline the work because he would have lost his union pension benefits if he had accepted the offer of nonunion work which was within his trade. *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 712 P.2d 521 (1985).

### **Good Cause for Quitting.**

Good faith is a necessary requirement in establishing good cause for quitting employment. *Roby v. Potlatch Forests, Inc.*, 74 Idaho 404, 263 P.2d 553 (1953).

Power sawyer who sought work at lumber camp as strip sawyer but was assigned job as right-of-way sawyer which was more difficult and earned less wages and who quit within a few days was not entitled to unemployment benefits since due to the short time he worked on the job he was unable to establish an average daily wage, hence good cause for quitting was not shown. *Roby v. Potlatch*

Forests, Inc., 74 Idaho 404, 263 P.2d 553 (1953).

"Good cause" within the meaning of this section is not susceptible of an exact definition. Rather, the meaning of these words must be determined in each case from the facts of that case. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963); *Ellis v. Northwest Fruit & Produce*, 103 Idaho 821, 654 P.2d 914 (1982); *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 712 P.2d 521 (1985).

While it is a fact as set forth in the findings of a federal employing agency that claimant resigned, Idaho authorities must apply Idaho law to determine if claimant voluntarily left his employment without good cause. *Saulls v. Employment Sec. Agency*, 85 Idaho 212, 377 P.2d 789 (1963).

In order to constitute good cause, the circumstances which compel the decision to leave employment must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical; there must be some compulsion produced by extraneous and necessitous circumstances. The standard of what constitutes good cause is the standard of reasonableness as applied to the average man or woman and not to the supersensitive. *Burroughs v. Employment Sec. Agency*, 86 Idaho 412, 387 P.2d 473 (1963); *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 712 P.2d 521 (1985).

A construction of "good cause" as used in this section, which will enable an employee to resign and yet be eligible for unemployment compensation, must not be extended to include purely personal and objective reasons which are unique to the employee, but requires that such cause is not a condition which by common knowledge is usual where accompanied by minor irritations. *Boodry v. Eddy Bakeries Co.*, 88 Idaho 165, 397 P.2d 256 (1964).

Doubt as to whether employer would have sufficient work for employee after six-day lay-off due to weather conditions was not good cause for quitting. *Conrad v. Altmiller*, 89 Idaho 214, 404 P.2d 337 (1965).

An employee who quit his job as a ski lift operator because the transportation provided by the employer between his lodging and his place of employment caused him to get motion sickness and because he was not given the extra shift work he expected and which would have made it possible for him to provide his own transportation left his employment voluntarily without good cause within the meaning of this section, where the employee knew before accepting employment the transportation offered by the employer would cause motion sickness and where there was no evidence that the hours and pay offered him were less favorable than those prevailing for like employment in that locality. *Clark v.*

*Bogus Basin Recreational Ass'n*, 91 Idaho 916, 435 P.2d 256 (1967).

Mere fact that claimant, who after discharge from armed forces, was hired as a fire fighter and assigned duties as a member of "brush crew," may not have enjoyed the prospect of living away from town and in a logging camp was not enough to establish "good cause" where no evidence showed that living in such atmosphere would in any way be deleterious to his mental or physical health or well being. *McMunn v. Department of Public Lands*, 94 Idaho 493, 491 P.2d 1265 (1971).

Where employer withheld more than \$100 from employee's paycheck and employee's attempts to obtain an explanation concerning the withholding were unsuccessful, employee had good cause for leaving his employment and was therefore not disqualified from receiving unemployment benefits. *Smith v. Johnson's Mill*, 96 Idaho 760, 536 P.2d 755 (1975).

A substantial reduction in working hours, under some circumstances, may provide good cause for termination of one's employment, but a part-time worker who had previously refused to accept full-time employment, does not have cause to quit simply because her hours are somewhat reduced. *Stone v. South Hill Chevron*, 99 Idaho 162, 578 P.2d 1093 (1978).

Terminating employment because the employee believed that his honesty was in question does not constitute such a circumstance that compels him to leave his employment. *Rogers v. Trim House*, 99 Idaho 746, 588 P.2d 945 (1979).

The test used in determining whether good cause is present continues to be whether a reasonable person would consider the circumstances resulting in a claimant's unemployment to be real, substantial, and compelling. *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89 (1979); *Fong v. Jerome School Dist. No. 261*, 101 Idaho 219, 611 P.2d 1004 (1979).

"Good cause" within the meaning of this section is not susceptible of an exact definition. Rather, the meaning of these words must be determined in each case from the facts of that case. *Ellis v. Northwest Fruit & Produce*, 103 Idaho 821, 654 P.2d 914 (1982).

When an employee has viable options available to him, his voluntary termination without exploring those options does not constitute good cause for obtaining unemployment compensation. *Ellis v. Northwest Fruit & Produce*, 103 Idaho 821, 654 P.2d 914 (1982).

Where claimant had a reasonable alternative to quitting: he could have discussed his back problem, which was aggravated by the working conditions, with his employer and he could have discussed his dissatisfaction with not being given the sales job for which he



thought he had been hired, such claimant did not have "good cause" for leaving his employment and denial of unemployment benefits was supported by substantial evidence. *Ellis v. Northwest Fruit & Produce*, 103 Idaho 821, 654 P.2d 914 (1982).

Where employer misinterpreted nepotism law as forbidding employment of married coworkers and informed engaged couple that one of them would have to resign after marriage, and where both husband and wife then resigned, wife did not have "good cause" to resign, once husband had already resigned, and consequently was not entitled to benefits. *Berger v. Nez Perce Sheriff*, 105 Idaho 555, 671 P.2d 468 (1983).

Where an employee quit rather than work under a procedure whereby money would be deducted from her wages until she redid work to her employer's satisfaction, substantial evidence supported the industrial commission's findings that she quit for good cause and was eligible for unemployment benefits. *Wood v. Quali-Dent Dental Clinics*, 107 Idaho 1020, 695 P.2d 405 (1985).

The quitting of work which is not suitable work is always good cause under this section. *Peters v. Drake Mechanical*, 108 Idaho 610, 701 P.2d 230 (1985).

Where the claimant left his employment when he found that his wages had been reduced to \$3.35 per hour from \$7.50 to \$13.00 per hour, the industrial commission's finding of claimant's good cause to voluntarily quit was reasonable and supported by the evidence. *Kyle v. Beco Corp.*, 109 Idaho 267, 707 P.2d 378 (1985).

The meaning of "good cause" within this section is a factual determination to be made by the commission on a case-by-case basis. *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 712 P.2d 521 (1985).

Where the employee was interrogated in a heavy-handed and offensive manner, and the inquisition intimated her guilt on unfounded charges of theft to the point where she correctly surmised that she was about to be fired, the employee had "good cause" to quit her employment. *Bortz v. Payless Drug Store*, 110 Idaho 942, 719 P.2d 1202 (1986).

Good cause for quitting will not be extended to include purely personal and subjective reasons which are unique to the employee or cases accompanied by minor irritations. *Dey v. Edward G. Smith & Assocs.*, 110 Idaho 946, 719 P.2d 1206 (1986).

The industrial commission did not err in concluding that an employee who resigned voluntarily, believing he had a firm job offer from another employer, left his employment voluntarily with "good cause," as is required under the personal eligibility conditions of the Employment Security Act. *Schafer v. Ada*

*County Assessor*, 111 Idaho 870, 728 P.2d 394 (1986).

A determination of "good cause" to terminate employment under this section depends primarily upon the particular facts of a case. *Schafer v. Ada County Assessor*, 111 Idaho 870, 728 P.2d 394 (1986).

Whether "good cause" to terminate employment is present depends upon whether a reasonable person would consider the circumstances resulting in the claimant's unemployment to be real, substantial, and compelling. *Schafer v. Ada County Assessor*, 111 Idaho 870, 728 P.2d 394 (1986).

An employer's violation of § 45-611 gives the aggrieved employee good cause as a matter of law for leaving his or her employment if the amount withheld was not trivial, and the employee's attempt to settle the matter with his or her employer was rebuffed. *Stevenson v. TR Video, Inc.*, 112 Idaho 1081, 739 P.2d 380 (1987).

Where there was no indication that employee was threatened or intimidated, or in any way forced to resign and since a request by an employer to complete assigned tasks simply does not amount to a "necessitous circumstance" that would compel a reasonable person to quit work, employee did not have good cause to resign. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Where employer testified that he told claimant he was to be placed on probation and discharged only at some point in the future if his performance did not improve, and claimant himself testified that employer stated "that if I didn't speed up and do a lot of the stuff he thought I wasn't doing, that he'd have to let me go" and fellow worker testified that claimant had decided to quit prior to requesting his advice and that he never encouraged claimant to resign, such testimony confirmed that any discharge was contingent upon future events, and was at odds with a claim that a person reasonably believed that he had already been discharged. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Whether an employee had "good cause" to quit is governed by the standard of reasonableness as applied to the average man or woman, and not to the supersensitive. There must be a compulsion to quit produced by real and necessitous circumstances. Further, an employee must explore all viable options before making the decision to quit. This further requirement stems from the fact that the policy of law is to encourage the employer and employee to adjust their differences and thus avoid interrupting the employment. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Where the record was clear that, following his meeting with his employer, employee did not attempt to perform the requested tasks or

to reach a compromise with employer and although employee testified to a perceived inability to do the work requested of him, an inability to handle one's job does not rise to the level of good cause to resign. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Where physician concluded that employee's depression was work-related, even if one characterized employee's unexplained absence as a voluntary termination of employment, the commission could find that the termination was for good cause. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 903 P.2d 90 (1995).

Unemployment compensation claimant quit her job for good cause and was eligible for unemployment benefits where, following reporting incident of sexual harassment to management and the general office as required by her duties as sexual harassment officer, she was reprimanded by supervisor for fulfilling job responsibilities, supervisor refused to withdraw reprimand and retaliated against claimant, who suffered health related problems as a result of associated job stress. *Reedy v. M.H. King Co.*, 128 Idaho 896, 920 P.2d 915 (1996).

Industrial commission correctly found that an employee had good cause to quit her job, and was therefore entitled to unemployment benefits, where she had been discriminated against due to her decision to return to work following the birth of her child. *Moore v. Melaleuca, Inc.*, 137 Idaho 23, 43 P.3d 782 (2002).

Pursuant to this section, in order to qualify for unemployment benefits after voluntarily separating from work, a claimant must demonstrate that his resignation was for good cause connected with his employment; although the employee alleged conditions that created tension between himself and his former employer, those issues did not provide the employee with good cause to leave his employment. *Buckham v. Idaho Elk's Rehab. Hosp.*, 141 Idaho 338, 109 P.3d 726 (2005).

#### —Sexual Harassment.

Sexual harassment may constitute a "good cause" under this section, however, the term "sexual harassment" itself is not defined in the unemployment statute, nor does it appear therein, and rather than have the Supreme Court engage in what it perceives as creating judicial legislation with regard to "sexual harassment" in an area where the legislature has not spoken, it is more appropriate for the legislature or the Department of Employment in its rules and regulations, to define "sexual harassment" and to establish guidelines for determining what constitutes same. *Jensen v. Siemsen*, 118 Idaho 1, 794 P.2d 271 (1990).

Where an employee voluntarily quit her

employment, the burden was on the employee to prove that it was for good cause pursuant to subsection (5) of this section; substantial and competent evidence supported the industrial commission of the state of Idaho's finding that the sexual nature of the employee's supervisor's conduct created an unacceptable working condition, that the supervisor engaged in other behavior that created a hostile work environment, and that the employee pursued all available options before quitting her job, such that the decision of the commission that the employee quit for good cause in connection with her employment was proper. *White v. Canyon Highway Dist. # 4*, 139 Idaho 939, 88 P.3d 758 (2004).

#### —Unjust or Oppressive Treatment.

Alleged statements by superintendent that she was not indispensable did not justify unemployment compensation claimant in quitting employment on ground of unjust, or oppressive treatment. *Boddy v. Eddy Bakeries Co.*, 88 Idaho 165, 397 P.2d 256 (1964).

#### Inability to Work.

Claimant, a woman aged 75, who was afflicted with a heart condition, and who, after discharge, merely called over the phone for possible jobs as housekeeper was not entitled to unemployment benefits, since she was not able to work. *Turner v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956).

#### Labor Disputes.

This section in effect denies benefit qualification if the stoppage of work exists because of a labor dispute, provided, the worker of the class to which he belongs participates or is directly interested in the labor dispute which causes the work stoppage. Such statute mandates govern the findings of the industrial accident board, which findings are supported by substantial, though conflicting evidence. *Ankrum v. Employment Sec. Agency*, 83 Idaho 274, 361 P.2d 795 (1961).

A work stoppage within the meaning of this section is deemed to have ended when the employer has resumed substantially normal operations. *Totorica v. Western Equip. Co.*, 88 Idaho 534, 401 P.2d 817 (1965).

Where claimants did not intend to quit their jobs but only to protest the hiring of nonunion workers by a walkout from the job site, claimants' temporary absence, without the necessary intent to terminate employment, did not constitute leaving employment voluntarily without good cause and did not disqualify claimants for unemployment insurance benefits. *Coates v. Bingham Mechanical & Metal Prod., Inc.*, 96 Idaho 606, 533 P.2d 595 (1975).

Where the Metal Trades Council represented all the craft employees and these employees voluntarily banded together and



made the council their bargaining agent, and where the members of the council, with the exception of the carpenters, overwhelmingly voted to strike and subsequently participated in the strike which resulted in the work stoppage, the commission did not err in denying benefits to the carpenters. *Bentley v. Bunker Hill Co.*, 100 Idaho 571, 602 P.2d 69 (1979).

The phrase "grade or class" was clearly intended to include more than the group of employees directly interested or actually participating in the labor dispute. *Bentley v. Bunker Hill Co.*, 100 Idaho 571, 602 P.2d 69 (1979).

Determination of whether claimant's unemployment was due to a labor dispute was a factual matter for the commission to determine. *Peters v. Drake Mechanical*, 108 Idaho 610, 701 P.2d 230 (1985).

Where, after claimant's employer opted out of multi-employer bargaining unit negotiation for new contract with union and thus did not have agreement with union, claimant requested termination slip from such employer because he feared he would lose union pension benefits and be subject to union penalties and was replaced by another worker, claimant could not be denied unemployment benefits after such time on basis of any labor dispute pursuant to this section. *Peters v. Drake Mechanical*, 108 Idaho 610, 701 P.2d 230 (1985).

#### **Leave of Absence.**

Where claimant was on leave of absence from construction work in order to attend college, he had not "left his employment" under this section and; thus, when he was ready to resume an active employment status but was unable to due to weather conditions, he was eligible for unemployment benefits. *Gray v. Brasch & Miller Constr. Co.*, 102 Idaho 14, 624 P.2d 396 (1981).

#### **Leaving Prior to Firing Date.**

After an otherwise eligible employee has been fired but voluntarily terminates his employment prior to the effective firing date, his eligibility for receipt of unemployment benefits is not affected following the termination. *McCammon v. Yellowstone Co.*, 100 Idaho 926, 607 P.2d 434 (1980).

#### **Leaving to Live with Spouse.**

Where claimant voluntarily left her clerical job in order to move to California to live with her spouse, and claimant was not the main support of herself or of her immediate family, she did not qualify for unemployment compensation pursuant to this section. *Carlson v. Center of Resources for Indep. People*, 109 Idaho 1053, 712 P.2d 1161 (1984).

#### **Manner of Termination.**

Where a pole-maker questioned whether the employer would have enough work for

him after a six-day lay-off and, upon the employer suggesting that he would get some one in the pole-maker's place if he wasn't sure he would be back, agreed that it "was a good idea," the employee was not laid off, but quit. *Conrad v. Altmiller*, 89 Idaho 214, 404 P.2d 337 (1965).

Court affirmed denial of unemployment benefits where the industrial commission's final decision was that the statements which were made by the employer during a heated argument were not statements which would reasonably be interpreted as discharging the claimant. *Porter v. Gem State Plumbing*, 119 Idaho 54, 803 P.2d 555 (1990).

Where evidence shows that the employee was called into the employer's office for an unusual meeting, expecting to be offered the job of a co-worker who had been dismissed recently but was instead told by the employer that she would help the employee with applications and interviews for other jobs and asked by the employer, "Do you want me to let you go?," the evidence is substantial and competent, and is sufficient to support the industrial commission's finding that the employee was discharged. *Johnson v. Idaho Cent. Credit Union*, 127 Idaho 867, 908 P.2d 560 (1995).

#### **Misconduct.**

Where miner afflicted with silicosis was not supposed to work underground and was general custodian and caretaker, his refusal to go underground to temporarily operate hoist due to injury of another employee was not wilful and he was not guilty of misconduct. *Mandes v. Employment Sec. Agency*, 74 Idaho 23, 255 P.2d 1049 (1953).

The term "misconduct" as used in this section connotes intentional action on the part of the employee. *Mandes v. Employment Sec. Agency*, 74 Idaho 23, 255 P.2d 1049 (1953).

The term "discharged for misconduct" as used in this section should be interpreted as meaning wilful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of his employees. *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957); *Watts v. Employment Sec. Agency*, 80 Idaho 529, 335 P.2d 533 (1959).

The discharge of an employee for intentional, wilful misconduct deprives him of the right to unemployment compensation. *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

Appellant's actions in leaving the job site without giving or attempting to give his employer any notice of his leaving on the principal excuse that he felt some concern about his past-due paycheck when he knew his absence from employment as a scaler would result in a

shutdown of the entire logging operation were inconsistent with that type of conduct which his employer had a right to expect and were sufficient to support the finding that his conduct was a deliberate disregard of his employer's interest as found by the appeals examiner, therefore the jurisdiction of this court being limited to review of questions of law only, the board's findings would not be disturbed. *Watts v. Employment Sec. Agency*, 80 Idaho 529, 335 P.2d 533 (1959).

Insubordination of claimant or wilful disregard or violation of any rule or regulation of the employer involved was not established by competent evidence, claimant having given full testimony regarding his activities, of which testimony in the final analysis it was for the board to decide the credit and weight to be given such testimony. *Ramsey v. Employment Sec. Agency*, 85 Idaho 395, 379 P.2d 797 (1963).

An employee discharged from the postal service because of conviction of lewd conduct with minor or child under sixteen was "discharged for misconduct in connection with his employment" within the meaning of this section, as an employer has the right to expect his employees to refrain from acts which would bring dishonor on the business name or the institution. *O'Neal v. Employment Sec. Agency*, 89 Idaho 313, 404 P.2d 600 (1965).

A heating and air conditioning service man required to be available to emergency call on a standby basis twenty-four hours a day, seven days a week, unless replacement had been previously arranged for, discharged for habitually drinking while off-duty to the extent that he could not effectively answer service calls was not entitled to unemployment compensation. *Oliver v. Creamer Heating & Appliance Co.*, 91 Idaho 312, 420 P.2d 795 (1966).

Practice of telephone operators in making personal long-distance calls, without recording the same and without payment therefor, without the knowledge of and against the rules of the company, constituted "misconduct in connection with their employment" within the meaning of this section. *Alder v. Mountain States Tel. & Tel. Co.*, 92 Idaho 506, 446 P.2d 628 (1968).

Claimant who assaulted president of company causing him to be hospitalized for ten days was ineligible for unemployment benefits as his unemployment was due to misconduct in connection with his employment. *Levesque v. Hi-Boy Meats, Inc.*, 95 Idaho 808, 520 P.2d 549 (1974).

Where claimant was requested to perform certain work and refused the assignment as outside the purview of his job category and was discharged since there was not sufficient evidence to sustain finding of misconduct, he was entitled to unemployment compensation.

*Garrow v. Idaho State Sch. & Hosp.*, 95 Idaho 817, 520 P.2d 864 (1974).

Where claimant appeared before the industrial commission and testified that he had notified both the plant manager and his supervising leadman of the adverse effect of cold air on his broken tooth and such testimony was uncontradicted, such notice of physical handicap was proper and timely and claimant's refusal to accept work outdoors on account of his physical handicap did not constitute misconduct in connection with his employment. *Mata v. Broadmore Homes*, 95 Idaho 873, 522 P.2d 586 (1974).

Where claimant complained about length of work week and routing schedules during telephone conversation with employer, but where claimant did not use vulgar or abusive language and did not refuse to obey an order or directive given to him by his employer, claimant's conduct did not constitute "misconduct" which would disqualify him from unemployment compensation benefits. *Avery v. B & B Rental Toilets*, 97 Idaho 611, 549 P.2d 270 (1976).

The omission of previous employment data from an application for a position as a surveyor's aide with a U.S. Forest Service office was conduct arising "in connection with employment" within the meaning of this section. *Wroble v. Bonners Ferry Ranger Station*, 97 Idaho 900, 556 P.2d 859 (1976).

Where claimant had been discharged for inadvertently omitting from his application for a position as a surveyor's aide with a U.S. Forest Service office data concerning previous employment, claimant's discharge from employment was not a discharge for "misconduct" so as to preclude him from recovering unemployment benefits, for there was no deliberate violation of the spirit of the employer's rules. *Wroble v. Bonners Ferry Ranger Station*, 97 Idaho 900, 556 P.2d 859 (1976).

Where claimant violated company rules by using company typewriters to write private letters during business hours and repeatedly made private use of company telephones during working hours despite warnings, the industrial commission was not in error for denying claimant benefits on the ground that she had been discharged for misconduct. *Hutchinson v. J.R. Simplot Co.*, 98 Idaho 346, 563 P.2d 404 (1977).

While violation of an employer's rules is not, per se, misconduct which will render an employee ineligible for unemployment compensation benefits, deliberate violation of reasonable company rules ordinarily is misconduct which renders the claimant ineligible. *Hutchinson v. J.R. Simplot Co.*, 98 Idaho 346, 563 P.2d 404 (1977).

Where a stand-by employee sought out and accepted full-time employment but requested and received permission to start such work



one night later than planned, the employee did not refuse without good cause to accept available work or voluntarily quit work, nor could he be accused of misconduct barring him from receiving unemployment compensation. *White v. Idaho Forest Indus.*, 98 Idaho 784, 572 P.2d 887 (1977).

An employer's offer of other employment or transfer of employment to another department of the hospital would not constitute condonation of past misconduct and entitle claimant to unemployment benefits, since it is not unreasonable for employer to provide by rule that a higher or different standard of performance may be required in one department of the hospital as compared with other less critical areas of the hospital. *Weston v. Gritman Mem. Hosp.*, 99 Idaho 717, 587 P.2d 1252 (1978).

Violation of an employer's rule is not, per se, misconduct within the meaning of this section; rather, a deliberate and intentional violation of the spirit of the rule is required. *Simmons v. Department of Emp.*, 99 Idaho 290, 581 P.2d 336 (1978).

The improper notification of an employee's intended absence from work constituted such "misconduct" within the meaning of this section so as to make him ineligible for unemployment compensation. *Jenkins v. Agri-Lines Corp.*, 100 Idaho 549, 602 P.2d 47 (1979).

Where claimant worked as a "knocker" on the "kill" floor of defendant-employer's meat processing plant, had been drinking and discarding the glass bottles into a chute where parts of the animals killed were ground up for animal feed, had thrown a horn at a carcass, had been kicked in the face by a steer; argued with his supervisor, using extreme obscenities in an effort to cause a fight, over whether he should go to a hospital; and was fired by his supervisor for insubordination, the industrial commission was correct in finding that he had been discharged "for misconduct in connection with his employment" within this section. *Ortiz v. Armour & Co.*, 100 Idaho 363, 597 P.2d 606 (1979).

An employer should at least be able to expect an employee to refrain from screaming profanities into the ear of his supervisor and trying to provoke him to fight when claimant deliberately refused to continue working when instructed to do so by his supervisor, and balked when told he should go to the hospital if he was hurt, these were reasonable directives given by his supervisor, and the company was entitled to have them obeyed. *Ortiz v. Armour & Co.*, 100 Idaho 363, 597 P.2d 606 (1979).

Where the evidence in the record supported the finding that claimant was a very emotional and gregarious individual and that his threats against supervisors, who he believed

to be harassing his daughter on the job, were merely spontaneous verbal expressions of emotion not intended to be taken literally; accordingly, commission's decision that claimant was not disqualified from receiving benefits as having been discharged for misconduct was affirmed. *Parker v. St. Maries Plywood*, 101 Idaho 415, 614 P.2d 955 (1980).

When an employer challenges an unemployment compensation benefit claimant's eligibility for benefits on the ground that the claimant was discharged for employee misconduct, the employer must carry the burden of proving that the employee was in fact discharged for employment related misconduct. *Parker v. St. Maries Plywood*, 101 Idaho 415, 614 P.2d 955 (1980).

There is no requirement in the definition of misconduct that the claimant's disregard of standards of behavior must be found to have been subjectively willful, intentional or deliberate; rather, the test for misconduct in standard-of-behavior cases is (1) whether the employee's conduct fell below the standard of behavior expected by the employer and (2) whether the employer's expectation was objectively reasonable in the particular case; the employee's subjective state of mind is irrelevant. *Matthews v. Bucyrus-Erie Co.*, 101 Idaho 657, 619 P.2d 1110 (1980).

Where evidence showed that claimant was repeatedly late in reporting for work and was terminated on occasion when he reported late for work while under the influence of alcohol, there was sufficient evidence to support decision that claimant was guilty of misconduct in connection with his employment and was not entitled to unemployment compensation benefits. *Dingley v. Boise Cascade Corp.*, 104 Idaho 476, 660 P.2d 941 (1983).

Where the evidence showed that the claimant deputy sheriff entered a private residence uninvited late one night to allegedly alert the homeowner that her garage and house doors were unlocked, there was substantial, competent evidence of a disregard of standards of behavior which the sheriff employer had the right to expect of his employees, and the commission properly found that the deputy was discharged for misconduct. *Cornwell v. Kootenai County Sheriff*, 106 Idaho 823, 683 P.2d 859 (1984).

Where the evidence, though disputed, could be reasonably construed to show that claimant, a recreational therapist, displayed a negative, belligerent, and childish attitude; did not satisfactorily demonstrate or use the skills which were required for her job; did not endeavor to improve; did not meet the criteria defined by her employer for the position which she held; was consistently late to staff meetings, without excuse and despite repeated warnings; and that she refused to follow her employer's philosophy of patient

care, the evidence was sufficient to show that the claimant was ineligible for benefits because she had been terminated for work-related misconduct. *Harrelson v. Pine Crest Psychiatric Ctr.*, 107 Idaho 119, 686 P.2d 64 (1984).

In this section, "discharged for misconduct" means wilful, intentional disregard of the employer's interest, a deliberate violation of the employer's rules, or a disregard of standards of behavior which the employer has a right to expect of his employees; the test for misconduct in standard-of-behavior cases is (1) whether the employee's conduct fell below the standard of behavior expected by the employer; and (2) whether the employer's expectation was objectively reasonable in the particular case. *Goolsby v. Life Savers, Inc.*, 107 Idaho 456, 690 P.2d 911 (1984).

False information given with "deceitful intent" on an employment application is grounds for discharge for misconduct, but an inadvertent omission on an employment application without "deceitful intent" is not an adequate basis to discharge an employee for misconduct. *Brown v. Iowa Beef Processors*, 107 Idaho 558, 691 P.2d 1173 (1984).

Where an employee was discharged for failing to answer affirmatively a question on his job application relating to criminal convictions, the industrial commission properly denied unemployment benefits, since the evidence showed that the employee intentionally deceived the employer out of fear that he would not be hired if he answered truthfully; such false information, given with a deceitful intent, came within the meaning of a discharge for misconduct in this section. *Brown v. Iowa Beef Processors*, 107 Idaho 558, 691 P.2d 1173 (1984).

Some expectations and duties "flow normally from an employment relationship"; if certain practices or expectations are not common among employees in general or within a particular enterprise, and have not been communicated by the employer to the employee, they cannot serve as a proper basis for a charge of employee misconduct. *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 695 P.2d 1231 (1984).

The test for misconduct in standard-of-behavior cases is (1) whether the employee's conduct fell below the standard of behavior expected by the employer; and (2) whether the employer's expectation was objectively reasonable in the particular case. *Davis v. Howard O. Miller Co.*, 107 Idaho 1092, 695 P.2d 1231 (1984).

The test for employee misconduct in standard-of-behavior cases is as follows: (1) whether the employee's conduct fell below the standard of behavior expected by the employer; and (2) whether the employer's expectation was objectively reasonable in the par-

ticular case. An employee's disregard of standards of behavior need not be subjectively willful, intentional or deliberate. *Puckett v. Idaho Dep't of Cors.*, 107 Idaho 1022, 695 P.2d 407 (1985).

A violation of an employer's rule is not per se misconduct that will disqualify a claimant from receiving unemployment benefits; rather, there must be a deliberate and intentional violation of the spirit of the rule by the claimant. *Beaty v. City of Idaho Falls*, 110 Idaho 891, 719 P.2d 1151 (1986).

When an employee is discharged for misconduct, it must be shown to be work-related before unemployment benefits can be denied; work-relatedness is a factual determination and when a claimant's eligibility for unemployment benefits is challenged by the employer on the ground that the employment was terminated for misconduct, the employer must carry the burden of proving that the employee was in fact discharged for employment-related misconduct. *Beaty v. City of Idaho Falls*, 110 Idaho 891, 719 P.2d 1151 (1986).

Where the employee was convicted of possession of stolen guns and marijuana, and he was discharged from his employment as a city garbage collector for violating the city's employee code of conduct, there was no evidence of a deliberate violation of the specific rule at issue or the spirit of the city's rules of conduct generally such that the employee's off-duty conduct would amount to "misconduct" constituting a bar to unemployment benefits under this section. *Beaty v. City of Idaho Falls*, 110 Idaho 891, 719 P.2d 1151 (1986).

Since the question of whether an employee's conduct constitutes misconduct pursuant to this section is a factual one, the industrial commission's finding that an employee was fired for misconduct must be upheld if supported by substantial and competent evidence. *Gatherer v. Doyles Whsle.*, 111 Idaho 470, 725 P.2d 175 (1986).

The industrial commission's finding that the employee was fired for misconduct was supported by substantial and competent evidence where the employee was fired for repeatedly expressing his disagreements with company policies loudly and in the presence of other employees, contrary to the express direction of the employer. *Gatherer v. Doyles Whsle.*, 111 Idaho 470, 725 P.2d 175 (1986).

Misconduct is found where an employee's conduct falls below the standard of behavior expected by the employer and whether the employer's expectation was objectionably reasonable in the particular case. *Swanson v. State*, 114 Idaho 607, 759 P.2d 898 (1988).

Employee was not discharged for misconduct where her supervisor testified that she was doing a very good job. *Swanson v. State*, 114 Idaho 607, 759 P.2d 898 (1988).



Where there was substantial and competent evidence to support the commission's findings that the employer became dissatisfied with the employee's work performance after patients were lost due to her making contact at the patients' places of employment and treating patients in a rude and abusive manner, and the employer received complaints about her from patients and co-employees, the commission properly denied the employee unemployment compensation benefits because she was discharged for misconduct. *Lang v. Ustick Dental Office*, 120 Idaho 545, 817 P.2d 1069 (1991).

There was substantial competent evidence to support the industrial commission's finding that claimant was discharged for misconduct, which meant that claimant would not receive unemployment benefits; although the claimant may have had concerns about meeting with her supervisor alone, she had an obligation to discuss the matter with her supervisor or the administrator prior to the time of the scheduled meeting to make other arrangements, and the supervisor's concerns about protecting patients' confidentiality were real; therefore, the employer's expectation that the claimant meet with the supervisor and/or administrator to discuss the problems was reasonable and the claimant's refusal to do so constituted misconduct in connection with the employment. *Taylor v. Burley Care Ctr.*, 121 Idaho 792, 828 P.2d 821 (1991).

Employee was not ineligible for unemployment benefits due to a discharge based on "misconduct" as used in this section where employee directed workers on a road reconstruction project to take a section of old concrete pipe to his personal residence. *Campbell v. Bonneville County Bd. of Comm'rs*, 126 Idaho 222, 880 P.2d 252 (1994).

Misconduct, as used in this section is defined as either a willful, intentional disregard of the employer's interest, a deliberate violation of the employer's rules, or a disregard of standards of behavior which the employer has a right to expect of his employees, with the third type of conduct determined by (1) whether the employees' conduct fell below the standards of behavior expected by the employer; and (2) whether the employer's expectation was objectively reasonable in the particular case. *Wulff v. Sun Valley Co.*, 127 Idaho 71, 896 P.2d 979 (1995).

Because misconduct under this section means (1) a willful and intentional disregard of the employer's interest, (2) a deliberate violation of the employer's rules, or (3) a disregard of standards of behavior that the employer has a right to expect of an employee, the industrial commission should have considered all three grounds for determining misconduct, and not just the first, when it determined claimant was not terminated for

misconduct; decision was vacated and case remanded. *Dietz v. Minidoka County Hwy. Dist.*, 127 Idaho 246, 899 P.2d 956 (1995).

In measuring the sufficiency of the Commission's findings that claimant did not engage in misconduct disqualifying her from benefits, it is necessary to determine if employer proved (1) a deliberate violation of a known rule or (2) a breach of a standard of behavior that would flow normally from an employment relationship or which was communicated to claimant because of the uncommon nature. *Wulff v. Sun Valley Co.*, 127 Idaho 71, 896 P.2d 979 (1995).

In a proceeding for unemployment insurance benefits, where it is shown that the employer failed to communicate its expectations to employee, the employer could not be expected to comply with the uncommunicated expectations; consequently, employee could not be discharged for misconduct and is entitled to benefits. *Welch v. Cowles Publishing Co.*, 127 Idaho 361, 900 P.2d 1372 (1995).

An employer challenging a claimant's eligibility for unemployment insurance benefits, carries the burden of proving that the employee was discharged for employment related misconduct. *Welch v. Cowles Publishing Co.*, 127 Idaho 361, 900 P.2d 1372 (1995).

The question of whether an employee's conduct constituted misconduct pursuant to this section is a factual one, and the determination of the industrial commission will be upheld if supported by substantial and competent evidence. *Welch v. Cowles Publishing Co.*, 127 Idaho 361, 900 P.2d 1372 (1995).

Failures in job performance do not constitute misconduct within the meaning of the Employment Security Law. *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 914 P.2d 564 (1996).

Where an employer passively turns a blind eye to otherwise objectionable conduct on the part of an employee, the employer does not lose the ability to discipline or terminate the employee which amounts to employment-related misconduct. *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 933 P.2d 642 (1997).

Although an employer's expectation that an employee will not engage in "protracted argument" with his employer is objectively reasonable, a single incident of comparatively nonserious disrespect by complaining and arguing is not misconduct. *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 933 P.2d 642 (1997).

Teacher's outburst and use of profanity in front of other teachers and students did not constitute a disregard of the standards of misbehavior which school district had a right to expect where teacher and principal had worked together as teachers prior to the one's promotion to principal and during that period

they had engaged in on ongoing course of conduct which included the use of profanity and when this happened principal did not formally reprimand teacher but simply requested that she not direct that type of language toward him and thus through his acquiescence, he let her to believe that such conduct was acceptable and that it was not in appropriate or unprofessional, and his failure to reprimand her when she used such language indicated to her that such behavior was appropriate between them; therefore, upon termination she was eligible for unemployment benefits. *Folks v. Moscow Sch. Dist. No. 281, 129 Idaho 833, 933 P.2d 642 (1997).*

Teacher was entitled to unemployment benefits following her termination because of her statements to principal in front of teachers and students using profanities, where it was established that principal and teacher had worked together as teachers for a long period before one became principal, that they frequently had used profane language in each other's presence, that after the one's promotion to principal, their relationship remained informal but turbulent and the teacher often visited principal in his office to express her dissatisfaction with the administration using profanities, that teacher was in an emotional state of mind due to a myriad of personal problems she was experiencing and had received news that the school had canceled the school program that was her main work, since such statements constituted a comparatively nonserious instance of disrespect, and the substantial and competent evidence supported the finding that her conduct did not constitute a willful or deliberate disregard of standards of behavior but was an emotional knee-jerk reaction of a stressful situation and because she lacked the required intent so that her behavior did not rise to the level of insubordination. *Folks v. Moscow Sch. Dist. No. 281, 129 Idaho 833, 933 P.2d 642 (1997).*

Where during fourteen-year-period that claimant worked for employer as an industrial hygienist, there were no warnings that his method of recording test results was wrong; claimant's testimony that personal tests could be conducted without that person being present was not clearly contradicted; and employer did not establish that claimant's alleged failure to comply with regulations constituted a violation of employer's reasonable expectations, it followed that the Commission correctly held that claimant's discharge was not justified for misconduct as claimed by employer *Quinn v. J.R. Simplot Co., 131 Idaho 318, 955 P.2d 1097 (1998).*

The question of whether an employee's behavior constitutes misconduct in connection with employment pursuant to this section is a question of fact and court will uphold industrial commissions's determination of the issue

if supported by substantial and competent evidence. *Folks v. Moscow Sch. Dist. No. 281, 129 Idaho 833, 933 P.2d 642 (1997).*

There was substantial and competent evidence that the employee was discharged for misconduct and therefore not eligible for unemployment benefits, where the restaurant had a written policy on proper cash handling, and the policy was reasonable to ensure the employer collects for the services provided to the customer; the employee was aware of the company's rules, which had been communicated to her both when she was hired and in her second write-up, which expressly warned her that the next violation would result in termination; and as established by company policy, the employee was terminated after her third violation. *Steen v. Denny's Restaurant, 135 Idaho 234, 16 P.3d 910 (2000).*

Where the evidence showed that an employee received two warning letters regarding misconduct, but then was terminated a few days later while on vacation, the employer failed to show that the employee was ineligible for unemployment benefits based on a failure to adhere to the employer's reasonable standard of behavior. *Oxley v. Med. Rock Specialties, Inc., 139 Idaho 476, 80 P.3d 1077 (2003).*

Where the evidence showed that an employer waited four months to investigate allegations that an employee had stolen inventory and was unable to provide evidence of which items were taken or when the events occurred, there was insufficient evidence to support a misconduct claim based on theft; therefore, unemployment benefits were properly awarded. *Oxley v. Med. Rock Specialties, Inc., 139 Idaho 476, 80 P.3d 1077 (2003).*

Employee's failure to maintain his insurability on the employer's automobile policy did not rise to "misconduct", where the employer had not adequately informed the employee as to what he had to do to remain insurable. *Harris v. Elec. Wholesale, 141 Idaho 1, 105 P.3d 267 (2004).*

#### **Misrepresentation in Job Application.**

A claimant's application for unemployment benefits was properly turned down by the department of employment, where the employer grounded claimant's discharge on his failure, in applying for work at its plant, to enter a checkmark to indicate that he had had "epilepsy or fits," even though claimant's fellow employees at the plant were aware of his affliction, and that he made no attempt to conceal it, and even though when he applied for work he had been seizure-free for over six years. *Woodhams v. Ore-Ida Foods, Inc., 101 Idaho 369, 613 P.2d 380 (1980).*

#### **Number of Hours Worked.**

The number of hours during the week which a claimant is working, even though the



work may be voluntary and no compensation received, may nevertheless be material to the question of whether he is "available for suitable work, and seeking work" as required for eligibility under this section. Hence, the number of hours worked during the week for his employer, whether they be gratuitous or for pay, is a material fact and must be reported by the claimant. *Smith v. State, Dep't of Emp.*, 107 Idaho 625, 691 P.2d 1240 (1984).

#### **Other Benefits No Bar to Recovery.**

A person drawing old-age benefits is not necessarily barred from recovering unemployment benefits. *Turner v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956).

#### **Personal and Subjective Reason for Leaving Work.**

Where claimant for unemployment benefits left his job to accept a similar position with another employer for an increase in pay and because he did not like sleeper team operations, the Commission's determination that based on the record the claimant left the job for purely personal and subjective reason was supported by substantial and competent though conflicting evidence. *Conrad v. State, Dep't of Emp.*, 130 Idaho 187, 938 P.2d 1225 (1997).

#### **Proof.**

Claimant must prove the following essentials in order to claim unemployment benefits under this section: (1) ability to work, (2) availability for suitable work, and (3) seeking work. *Turner v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956).

#### **Reasonable Effort to Secure Work.**

Claimant's desire to restrict her employment to daytime hours because she had a dog and did not wish to be out nights does not constitute good cause for refusing to make a reasonable effort to secure employment. *Czarlinsky v. Employment Sec. Agency*, 87 Idaho 65, 390 P.2d 822 (1964).

Where a claimant was seasonal employee, her failure to follow up a referral for a permanent job which would prevent her return to her seasonal work was not a failure without good cause to apply for available work under this section and would not render her ineligible for benefits. *Rehart v. Department of Emp.*, 98 Idaho 549, 568 P.2d 522 (1977).

#### **Refusing Offered Work.**

Health, physical fitness, and experience should be considered in determining whether claimant for unemployment compensation is justified in refusing offered job. *Wolfgram v. Employment Sec. Agency*, 75 Idaho 389, 272 P.2d 699 (1954).

Where appeals examiner denied unemployment compensation to claimant who turned down offer of work in a mine due to tendency

to heat rash in working in hot mine, the cause was remanded for taking of additional evidence due to the fact that the record did not disclose exactly what took place when claimant applied for work at the mine, since board at the hearing should determine exactly what work was offered, the extent to which claimant investigated the offer, and the probable effect on claimant of such offered employment. *Wolfgram v. Employment Sec. Agency*, 75 Idaho 389, 272 P.2d 699 (1954).

An employee who refuses suitable work based on a fear that the offered work may be detrimental to his health is ineligible for benefits unless he gives the offered job a fair trial. *Wolfgram v. Employment Sec. Agency*, 77 Idaho 298, 291 P.2d 279 (1955).

A miner was not entitled to security benefits where he refused an offered job of underground work in a mine where he had formerly worked, because of fear that he might contract heat rash he had previously suffered from while working in lower level of the mine, where the evidence showed that rash had not been disabling and was of short duration. *Wolfgram v. Employment Sec. Agency*, 77 Idaho 298, 291 P.2d 279 (1955).

Where one has suitable employment and refuses to work under reasonable regulations and conditions, and pursuant to reasonable directives of management, such person is not within the terms of the act, allowing benefits. *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

Where an employee has been informed of the necessity of working Monday, December 26, which the governor had declared to be a legal holiday, and such employee had refused to work on such day and not shown up at the store, discharge of such employee for such refusal to work was a discharge for misconduct and deprived the employee of right to unemployment compensation, such employee having been advised of the longstanding company policy requiring work on such day and the directive to work on that day being reasonable. *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

Where claimant was advised to report to work on a certain date but claimant failed to do so and applied for unemployment compensation benefits on the same day he was notified that employment was available, claimant was not entitled to benefits. In re *O'Toole's Claim*, 81 Idaho 370, 341 P.2d 197 (1959).

The industrial accident board did not abuse its discretion and make a finding which was arbitrary and unsupported by any evidence that a tender of a job was made to claimant. In re *O'Toole's Claim*, 81 Idaho 370, 341 P.2d 197 (1959).

Claimant who refused to apply for a position that guaranteed him salary of \$5,000 per year plus commissions and bonuses because

he would be expelled from union whose rules prohibited employment on anything other than an hourly basis was ineligible for benefits under this statute where evidence showed that yearly salary, bonuses and commissions would net him as much or more than he would earn in intermittent employment at union scale. *Norman v. Employment Sec. Agency*, 83 Idaho 1, 356 P.2d 913 (1960).

It is essential that a claimant who is being interviewed for possible employment must evidence good faith in attempting to cultivate the job opportunity. If they discourage a prospective employer, the claimants are treated precisely as if they had received and refused an offer of suitable employment. *Czarlinsky v. Employment Sec. Agency*, 87 Idaho 65, 390 P.2d 822 (1964).

A claimant's refusal to apply for suitable work will only disqualify him or her if there is no good cause to justify such refusal; applying this section requires two determinations: 1) whether a claimant had good cause to refuse to apply or accept such work; and 2) whether such work, which was refused by the claimant, is suitable work. *Plante v. Ken's Elec.*, 108 Idaho 809, 702 P.2d 847 (1985).

Nurse who refused to accept a position as staff nurse following her discharge from a supervisory position was properly considered discharged, rather than voluntarily quit. *Laundry v. Franciscan Health Care Ctr.*, 125 Idaho 279, 869 P.2d 1374 (1994).

Offer of job at \$5,000 less than previous job had paid and which would have required claimant to move to a different locality was not an offer of suitable employment, and did not disqualify applicant from benefits. *Qualman v. State*, 129 Idaho 92, 922 P.2d 389 (1996).

### Seeking Work.

A claimant for unemployment compensation is not obligated to travel great distances from his home in order to satisfy the requirement of actively seeking work. *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1963).

Claimant's statement that he checked the want ads of both local newspapers and from time to time inquired of friends about work was such limited activity that in and of itself did not constitute sufficient active effort to secure work. *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1963).

Claimant was under the continuing duty to inquire of prospective employers for work that he was capable of performing. *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1963).

One who makes no effort to secure work in his usual trade or occupation or any other suitable employment, other than reporting weekly to the office of the unemployment

service division of the employment security department, is not actively seeking work. *Hudson v. Hecla Mining Co.*, 86 Idaho 447, 387 P.2d 893 (1963).

### Self Employment.

Availability for resumption of regular job, hours per week devoted to questioned activity, net income earned by the activity, nature of regular job and whether applicant engages in the same activity while working his regular job are factors in accord with public policy which may be considered in judging whether applicants are self employed or unemployed. *Corwin v. Sunshine Mining Co.*, 96 Idaho 211, 525 P.2d 993 (1974).

The commission's determination that a claimant's principal occupation was not self employment was proper where it was shown from the record that the claimant spent an equal amount of time as an employee of a ski resort and as a self-employed proprietor of a marina, but that the claimant's earnings as an employee exceeded her share of the gross income from the marina. *Colvard v. Department of Emp.*, 98 Idaho 868, 574 P.2d 910 (1978).

### Severance Payments.

Only the first two weeks of the claimant's severance plan was an award for the claimant's past service, and the remainder of the money paid to the claimant for 50 more weeks was paid to her as consideration for her agreement (1) not to sue her employer and (2) to release her employer from any claim that she might have against it relating to her employment or termination. Therefore, after the first two weeks, the payments from her employer were not reportable "severance pay" within the meaning of Idaho Admin. Code 09.01.30.525.11, and accordingly, the claimant was not required to repay the unemployment benefits she received. *Parker v. Underwriters Labs., Inc.*, 140 Idaho 517, 96 P.3d 618 (2004).

### Standards for Eligibility.

The legislature has concluded that the standards for eligibility may be less demanding when a claimant declines an offer for a new job than when he or she elects to quit an existing job. *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89 (1979); *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 712 P.2d 521 (1985).

Section 72-1366(4) had no application where the employee was not considered ineligible for benefits because, during the whole of any week with respect to which he claimed benefits, he was unable to work, unavailable for suitable work, and not seeking work; the employee's claim for benefits was denied because he failed to prove that he had good cause for voluntarily quitting his employ-



ment, therefore the Idaho industrial commission did not err in failing to consider § 72-1366(4). *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 67 P.3d 1265 (2003).

### **Suitable Work.**

Where one is offered certain job conditions and these are later not fulfilled thereby making the job substantially less favorable, the work would not be "suitable." *Clay v. Crooks Indus.*, 96 Idaho 378, 529 P.2d 774 (1974).

This section requires a specific offer of employment to be tendered to a prospective employee before it can be concluded that there has been a failure by the employee to accept suitable work when offered. *Tackett v. Continental College of Beauty*, 96 Idaho 634, 534 P.2d 464 (1975).

Distance must be considered in assessing the suitability of jobs which, by their nature, require traveling; if a reasonable person in claimant's position who truly desired to work would have considered the offer unacceptable, the offer would not have been an offer of suitable employment. *Meyer v. Skyline Mobile Homes*, 99 Idaho 754, 589 P.2d 89 (1979).

Considering claimant's prior employment history, experience and training, the commission correctly concluded that the work in telephone solicitation sales was suitable as a temporary, part-time job for claimant. *Howard v. Department of Emp.*, 100 Idaho 314, 597 P.2d 37 (1979).

Work which may be deemed "unsuitable" at the inception of claimant's unemployment, and for a reasonable time thereafter, because it pays less than his prior earning capacity, may thereafter become "suitable" work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning capacity. *Guillard v. Department of Emp.*, 100 Idaho 647, 603 P.2d 981 (1979).

Where a claimant did not carry or satisfy her burden of showing that her health, safety or morals would be jeopardized or that the conditions of the night shift would have been substantially less favorable, and where the record was devoid of a showing that Sunday night work as, in the lumber industry and in that area, anything other than the usual, ordinary and accepted practice, there was no showing that her refusal of the proffered employment was for any but personal and subjective reasons. *Owen v. Newberg Cedar*, 101 Idaho 77, 609 P.2d 144 (1980).

Where the claimant and her employer could not agree in April on new employment terms to take effect when the claimant's contract expired at the end of June, the employer hired someone else to take the claimant's position as of July; however, in May the employer offered the claimant an opportunity to work one additional month, July, at her current

wages, the claimant's refusal of this offered employment for July constituted a refusal of an offer of suitable employment without good cause and supported the commission's denial of unemployment compensation benefits, despite the claimant's contention that she would have had to spend the month of July looking for a permanent position. *Ralston v. Pend Oreille Veterinary Serv.*, 101 Idaho 462, 615 P.2d 769 (1980).

The fact that a labor union will impose sanctions upon a member who accepts a non-union job in the type of work covered by the union's bargain agreements does not render such work "unsuitable" under the statutory language of this section. *Ullrich v. Thorpe Elec.*, 109 Idaho 820, 712 P.2d 521 (1985).

The eligibility requirement of this section requires a two-part analysis, i.e., a determination of whether the work refused by a claimant is "suitable" work, and also whether the claimant had "good cause" to refuse to accept such work. *O'Dell v. J.R. Simplot Co.*, 112 Idaho 870, 736 P.2d 1324 (1987).

Position of staff nurse offered the employee following employee's discharge as director of nurses was a "suitable offer" of employment. *Laundry v. Franciscan Health Care Ctr.*, 125 Idaho 279, 869 P.2d 1374 (1994).

Unemployment compensation claimant was ineligible for benefits because she was not "unemployed" as defined by § 72-1312 and this section, for nothing indicated that her health, safety, morals, or physical fitness would be at risk, that she would be forced to commute an unreasonable distance, or that her potential earnings as a real estate professional would be significantly different than her former salary as office manager, and, additionally, her desires to limit her search to only 8-5 office positions and not work full-time as a real estate professional amounted to self-imposed conditions barring her from unemployment compensation. *Scrivner v. Service IDA Corp.*, 126 Idaho 954, 895 P.2d 555 (1995).

The degree of risk to an individual's health is a factor to be considered in determining whether or not work is suitable for an individual. *Clay v. BMC W. Truss Plant*, 127 Idaho 501, 903 P.2d 90 (1995).

### **Temporary Employment.**

This section does not differentiate between seasonal and permanent employees, so that a permanent employee who had been laid off, and had made himself available for only temporary employment, is entitled to the benefits of this act. *Yancey v. Department of Emp.*, 93 Idaho 77, 455 P.2d 679 (1969).

### **Termination as a Result of Resignation.**

Where employee gave employer a two-week notice of resignation and the employer rejected the resignation and discharged her

instead, eligibility for unemployment benefits should have been based on both periods of separation consistent with this section and IDAPA 09.01.30.476.03. *Mason v. Donnelly Club*, 135 Idaho 581, 21 P.3d 903 (2001).

#### **Validity of IDAPA Regulation.**

IDAPA 09.30.484 is a reasonable interpretation of this section; therefore, it is valid and entitled to deference. *Garner v. Horkley Oil*, 123 Idaho 831, 853 P.2d 576 (1993).

#### **Voluntarily Leaving.**

Where an employee discontinues work because of a strike, there is no severance of the employment relationship and, thus, he could not be held to have left his employment voluntarily without good cause under this section. *Totorica v. Western Equip. Co.*, 88 Idaho 534, 401 P.2d 817 (1965).

When an employee voluntarily terminates employment and seeks unemployment benefits, it is incumbent upon him to show that the termination was based on "good cause" as required by the statute. *McMunn v. Department of Public Lands*, 94 Idaho 493, 491 P.2d 1265 (1971).

An employee has not left work "voluntarily without good cause" if conditions were unsuitable compared to the job as originally offered. *Clay v. Crooks Indus.*, 96 Idaho 378, 529 P.2d 774 (1974).

Where union sheet metal workers employed by one subcontractor walked off a job site in protest of another subcontractor using non-union sheet metal workers, and upon attempting to return to work were told that the job was over, they did not intend to voluntarily terminate their employment and could not be denied unemployment benefits under this section. *Coates v. Bingham Mechanical & Metal Prod., Inc.*, 96 Idaho 606, 533 P.2d 595 (1975).

Where claimant left his employment following employer's denial of claimant's request for leave of absence so he could bring his family to Idaho, claimant failed to sustain his burden of showing good cause for voluntary termination of employment and thus failed to show he was entitled to unemployment benefits. *Flynn v. Amfac Foods, Inc.*, 97 Idaho 768, 554 P.2d 946 (1976).

Where a claimant for unemployment compensation terminated her previous employment in order to accompany her husband to a different locale, the claimant was not eligible for unemployment compensation since her employment was terminated by her own free will for causes over which her employer had no control and which had nothing to do with the conditions of her employment. *Pyeatt v. Idaho State Univ.*, 98 Idaho 424, 565 P.2d 1381 (1977).

Where a stand-by employee sought out and accepted full-time employment but requested

and received permission to start such work one night later than planned, the employee did not refuse without good cause to accept available work or voluntarily quit work, nor could he be accused of misconduct barring him from receiving unemployment compensation. *White v. Idaho Forest Indus.*, 98 Idaho 784, 572 P.2d 887 (1977).

Where there was substantial and competent evidence in the record to support the commission's findings that the claimant quit his employment due to his son's termination, and that such was not a sufficiently compelling reason to constitute "good cause" for leaving his employment to make him eligible for unemployment benefits pursuant to this section, the order of the industrial commission would be affirmed. *Harris v. Green Tree, Inc.*, 100 Idaho 227, 596 P.2d 99 (1979).

Where a school superintendent informed all teachers that they would be expected to have not more than a seven percent failure rate, and they would be required to justify any failure rate exceeding that percentage, but where claimant declined to renew her teaching contract at the school for the coming year because she felt she could not conform to the newly announced guidelines without violating her own ethical and professional standards, unemployment benefits were properly denied on the grounds that she voluntarily and without good cause quit her employment. *Fong v. Jerome School Dist. No. 261*, 101 Idaho 219, 611 P.2d 1004 (1979).

A condition of eligibility for unemployment compensation is that a claimant has not left employment voluntarily without good cause; a claimant who has voluntarily left employment bears the burden of establishing that such termination was for good cause. *Tendoy Area Council v. State, Dep't of Emp.*, 108 Idaho 441, 700 P.2d 63 (1985).

Factual determination of Commission that claimant's resignation was voluntary was not clearly erroneous where employer testified that he told claimant that he was to be placed on probation and discharged only at some point in the future if his performance did not improve, that claimant testified that employer told him if he didn't speed up and do more he thought he'd have to let him go, and that fellow employee testified that claimant had decided to quit prior to asking for his advice and that he did not encourage claimant to resign, for such testimony confirmed holding that any discharge was contingent on future events. *Hart v. Deary High Sch.*, 126 Idaho 550, 887 P.2d 1057 (1994).

Industrial commission did not misapply the statute when it denied the employee's claim for unemployment benefits where the commission determined that the employee had voluntarily terminated her employment with the employer without good cause connected to



her employment. *Ewins v. Allied Sec.*, 138 Idaho 343, 63 P.3d 469 (2003).

#### —Resignation.

The county sheriff's threat of filing criminal charges against former deputy sheriff was not good cause as a matter of law for voluntarily resigning, where the deputy sheriff was subsequently convicted of embezzling funds from her employer. *Hine v. Twin Falls County*, 114 Idaho 244, 755 P.2d 1282 (1988).

Where the employee attempted to withdraw resignation only two hours after it was submitted, she had been an employee for eight years, and her employer took the extraordinary precipitate action of following the employee to her home to deliver his acceptance, the employee did not leave her employment voluntarily without good cause; a denial of unemployment benefits in such a context would contravene the liberal construction necessary to effectuate the purpose of the Employment Security Act. *Swanson v. State*,

114 Idaho 607, 759 P.2d 898 (1988).

The industrial commission erred as a matter of law in failing to consider the employee's intention when she submitted her resignation which she withdrew only two hours later. *Swanson v. State*, 114 Idaho 607, 759 P.2d 898 (1988).

Absent prejudice to the employer as might take place where a resignation sets in motion steps for hiring a replacement, a denial of unemployment compensation is improper. *Swanson v. State*, 114 Idaho 607, 759 P.2d 898 (1988).

**Cited in:** *Nenoff v. Culligan Soft Water*, 97 Idaho 243, 542 P.2d 837 (1975); *Department of Emp. v. Kasum Communications*, 97 Idaho 372, 544 P.2d 1142 (1976); *Bullock v. CIT Co. Fed. Credit Union*, 106 Idaho 767, 683 P.2d 415 (1984); *Nampa Christian Schools Found., Inc. v. State ex rel. Dep't of Emp.*, 110 Idaho 918, 719 P.2d 1178 (1986); *Spruell v. Allied Meadows Corp.*, 117 Idaho 277, 787 P.2d 263 (1990).

#### DECISIONS UNDER PRIOR LAW

##### Availability for Work.

Fact that employee refused to accept work of different nature and at less pay would not necessarily render him unavailable for work in the absence of finding by board as to whether he could find the same or similar employment within reasonable distance of his home. *Hagadone v. Kirkpatrick*, 66 Idaho 55, 154 P.2d 181 (1944).

Availability test is met by claimant if he shows he is able, ready, and willing to accept and is seeking suitable work at a point where an available labor market exists. *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954); *Eytchison v. Employment Sec. Agency*, 77

Idaho 448, 294 P.2d 593 (1956); *Ellis v. Employment Sec. Agency*, 83 Idaho 95, 358 P.2d 396 (1961).

"Availability for work" required only the availability for suitable work which the claimant had no good cause for refusing. *Hagadone v. Kirkpatrick*, 66 Idaho 55, 154 P.2d 181 (1944).

The question of the extent to which an employee was justified in relying upon expectancy of reemployment, to warrant continued idleness, was for determination by the board. *Claim of Jackson*, 68 Idaho 360, 195 P.2d 344 (1948).

#### RESEARCH REFERENCES

**A.L.R.** — Employee's insubordination as barring unemployment compensation. 26 A.L.R.3d 1333; 20 A.L.R.4th 637.

Work-connected inefficiency or negligence as "misconduct" barring unemployment compensation. 26 A.L.R.3d 1356.

Unemployment compensation: eligibility as affected by claimant's refusal to work at particular times or on particular shifts. 35 A.L.R.3d 1129; 12 A.L.R.4th 611; 2 A.L.R.5th 475.

Right to unemployment compensation as affected by receipt of pension. 56 A.L.R.3d 520.

Right to unemployment compensation as affected by receipt of social security benefits. 56 A.L.R.3d 552.

Discharge for absenteeism or tardiness as

affecting right to unemployment compensation. 56 A.L.R.3d 674.

Construction of phrase "establishment" or "factory, establishment, or other premises" within unemployment compensation statute rendering employee ineligible during labor dispute or strike at such location. 60 A.L.R.3d 11.

Construction of phrase "stoppage of work" in statutory provision denying unemployment compensation benefits during stoppage resulting from labor dispute. 61 A.L.R.3d 693.

Unemployment compensation: eligibility of participants in sympathy strike or slowdown. 62 A.L.R.3d 314.

What constitutes participation or direct interest in, or financing of, labor dispute or strike within disqualification provisions of

unemployment compensation acts. 62 A.L.R.3d 314.

Refusal of nonstriking employee to cross picket line as justifying denial of unemployment compensation benefits. 62 A.L.R.3d 380.

Comment note — General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute. 63 A.L.R.3d 88.

Unemployment compensation: eligibility as affected by claimant's insistence upon conditions not common or customary to particular employment. 88 A.L.R.3d 1353.

Refusal of type of work other than that in which employee was formerly engaged as affecting right to benefits. 94 A.L.R.3d 63.

Unemployment compensation: eligibility as affected by claimant's refusal to accept employment at compensation less than that of previous job. 94 A.L.R.3d 63.

Unemployment compensation: eligibility as affected by claimant's refusal to work at reduced compensation. 95 A.L.R.3d 449.

Right to unemployment compensation as affected by claimant's receipt of holiday pay. 3 A.L.R.4th 557.

Leaving or refusing employment for religious reasons as barring unemployment compensation. 12 A.L.R.4th 611.

Unemployment compensation as affected by vacation or payment in lieu thereof. 14 A.L.R.4th 1175.

Employee's act or threat of physical violence as bar to unemployment compensation. 20 A.L.R.4th 637.

Eligibility for unemployment compensation as affected by voluntary resignation because

of change of location of residence. 21 A.L.R.4th 317.

Discharge from employment on ground of political views or conduct as affecting right to unemployment compensation. 29 A.L.R.4th 287.

Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits. 35 A.L.R.4th 691.

Unemployment compensation: eligibility as affected by claimant's insistence upon conditions not common or customary to particular employment. 88 A.L.R.3d 1353.

Leaving or refusing employment for religious reasons as barring employment compensation. 12 A.L.R.4th 611.

Unemployment compensation: eligibility as affected by claimant's refusal to work at particular times or on particular shifts for domestic or family reasons. 2 A.L.R.5th 475.

General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute. 63 A.L.R.3d 88.

Eligibility for unemployment compensation of employee who retires voluntarily. 75 A.L.R.5th 339.

Work-related inefficiency, incompetence, or negligence as "misconduct" barring unemployment compensation. 95 A.L.R.5th 329.

Use of employer's e-mail or internet system as misconduct precluding unemployment compensation. 106 A.L.R.5th 297.

Unemployment compensation: Harassment or other mistreatment by coworker as "good cause" justifying abandonment of employment. 121 A.L.R.5th 467.

## 72-1366A. Personal eligibility conditions — School district employees. [Repealed.]

### STATUTORY NOTES

**Compiler's Notes.** — This section which comprised I.C., § 72-1366A, as added by 1977, ch. 174, § 2, p. 448 was repealed by S.L. 1978, ch. 112, § 10.

**72-1367. Benefit formula.** — (1) To be eligible an individual shall have the minimum qualifying amount of wages in covered employment in at least one (1) calendar quarter of his base period, and shall have total base period wages of at least one and one-quarter ( $1\frac{1}{4}$ ) times his high quarter wages. The minimum qualifying amount of wages shall be determined each January 1 and shall equal fifty percent (50%) of the product of the state minimum wage, as defined by section 44-1502, Idaho Code, multiplied by five hundred twenty (520) hours, rounded to the lowest multiple of twenty-six (26).

(2) The weekly benefit amount shall be one twenty-sixth ( $\frac{1}{26}$ ) of highest quarter wages except that it shall not exceed the applicable maximum



weekly benefit amount. The maximum weekly benefit amount shall be established as follows:

(a) For calendar year 2006 and the calendar years thereafter, prior to December 31 of each year, the director shall determine the state average weekly wage paid by covered employers for the preceding calendar year and the maximum weekly benefit amount to be effective for new claims filed in the first full week of the following January and filed thereafter until a new maximum weekly benefit amount becomes effective under this subsection (2). The maximum weekly benefit amount shall be determined based on the following table, using a percentage of the state average weekly wage paid by covered employers for the preceding calendar year and the base tax rate that has been calculated for the following calendar year pursuant to section 72-1350, Idaho Code:

Maximum WBA Index		
Base Tax Rate At Least	Less Than	Average Weekly Wage Percentage
0.630%	0.840%	60%
0.840%	1.155%	59%
1.155%	1.470%	58%
1.470%	1.785%	57%
1.785%	2.100%	56%
2.100%	2.415%	55%
2.415%	2.730%	54%
2.730%	3.045%	53%
3.045%	3.360%	52%

(b) Effective for new claims filed in the first full week of July 2005, and filed thereafter until the first full week of the following January, the maximum weekly benefit amount shall be fifty-seven percent (57%) of the state average weekly wage paid by covered employers for the preceding calendar year. Prior to December 31, 2005, the director shall determine, by using the table provided in subsection (2)(a) of this section, the maximum weekly benefit amount to be effective for new claims filed in the first full week of the following January and filed thereafter until a new maximum weekly benefit amount becomes effective under subsection (2)(a) of this section.

(3) Any eligible individual shall be entitled during any benefit year to a total amount of benefits equal to his weekly benefit amount times the number of full weeks of benefit entitlement appearing in the following table based on his ratio of total base period earnings to highest quarter base period earnings.

Ratio of Total Base Period Earnings to Highest Quarter Earnings		Full Weeks of Benefit Entitlement
At Least	Less Than	
1.25	1.50	10
1.50	1.625	11

Ratio of Total Base Period Earnings to Highest Quarter Earnings		Full Weeks of Benefit Entitlement
At Least	Less Than	
1.625	1.750	12
1.750	1.875	13
1.875	2.00	14
2.00	2.125	15
2.125	2.250	16
2.250	2.375	17
2.375	2.500	18
2.500	2.625	19
2.625	2.750	20
2.750	2.875	21
2.875	3.000	22
3.000	3.125	23
3.125	3.250	24
3.250	3.500	25
3.500	—	26

(4) If the total wages payable to an individual for less than full-time work performed in a week claimed exceed one-half ( $\frac{1}{2}$ ) of his weekly benefit amount, the amount of wages that exceed one-half ( $\frac{1}{2}$ ) of the weekly benefit amount shall be deducted from the benefits payable to the claimant. For purposes of this subsection, severance pay shall be deemed wages, even if the claimant was required to sign a release of claims as a condition of receiving the pay from the employer. "Severance pay" means a payment or payments made to a claimant by an employer as a result of the severance of the employment relationship.

(5) Benefits payable to an individual shall be rounded to the next lower full dollar amount. [1947, ch. 269, § 67, p. 793; am. 1949, ch. 144, § 67, p. 252; am. 1951, ch. 236, § 7, p. 482; am. 1955, ch. 18, § 10, p. 20; am. 1957, ch. 53, § 1, p. 90; am. 1961, ch. 298, § 4, p. 539; am. 1967, ch. 117, § 10, p. 233; am. 1970, ch. 83, § 1, p. 201; am. 1971, ch. 341, § 2, p. 1328; am. 1973, ch. 114, § 1, p. 206; am. 1980, ch. 256, § 3, p. 667; am. 1980, ch. 264, § 10, p. 682; am. 1983, ch. 146, § 7, p. 382; am. 1987, ch. 317, § 2, p. 666; am. 1997, ch. 271, § 3, p. 786; am. 1998, ch. 1, § 85, p. 3; am. 2005, ch. 5, § 14, p. 6.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1970, ch. 83 provided that this act should be in full force and effect on and after July 5, 1970.

Section 3 of S.L. 1971, ch. 341 provided the act should take effect with benefit years beginning on and after July 4, 1971.

Section 4 of S.L. 1980, ch. 256 declared an emergency and stated that the act would be in full force and effect on and after March 31, 1980. Approved March 31, 1980.

Section 3 of S.L. 1987, ch. 317 read: "An emergency existing therefor, which emer-

gency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 1987. Section 2 of this act shall be in full force and effect on and after July 1, 1987."

Section 5 of S.L. 1997, ch. 271 read: "An emergency existing therefor, which emergency is hereby declared to exist, Section 1 of this act shall be in full force and effect on and after its passage and approval and retroactively to January 1, 1997. Sections 2, 3 and 4



of this act shall be in full force and effect on and after July 1, 1997." Approved March 21, 1997.

Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

## JUDICIAL DECISIONS

### ANALYSIS

Burden of proof.  
Monetary eligibility.

#### **Burden of Proof.**

The burden of furnishing evidence from which it can be determined what amount, if any, claimant should have been credited with for part-time work is upon claimant. *Cahoon v. Employment Sec. Agency*, 82 Idaho 224, 351 P.2d 477 (1960).

The claimant has the burden of establishing his eligibility for compensation benefits whenever his claim to such benefits is questioned. *Cahoon v. Employment Sec. Agency*, 82 Idaho 224, 351 P.2d 477 (1960).

#### **Monetary Eligibility.**

A divorced homemaker was not entitled to claim one-half of her husband's earnings for

purposes of monetary eligibility in obtaining unemployment benefits. *Curtis v. State, Dep't of Emp.*, 107 Idaho 956, 695 P.2d 341 (1984).

**Cited in:** *Knight v. Employment Sec. Agency*, 88 Idaho 262, 398 P.2d 643 (1965); *Department of Emp. v. Kasum Communications*, 97 Idaho 372, 544 P.2d 1142 (1976); *Howard v. Department of Emp.*, 100 Idaho 314, 597 P.2d 37 (1979); *Sheppard v. State, Dep't of Emp.*, 103 Idaho 501, 650 P.2d 643 (1982); *Nampa Christian Schools Found., Inc. v. State ex rel. Dep't of Emp.*, 110 Idaho 918, 719 P.2d 1178 (1986).

**72-1367A. Extended benefits.** — The extended benefits program shall be administered pursuant to the provisions of this section.

(1) Definitions. As used in this section, unless the context clearly requires otherwise:

(a) "Extended benefit period" means a period which:

(i) Begins with the third week after a week for which there is a state "on" indicator; and

(ii) Ends with either of the following weeks, whichever occurs later:

1. The third week after the first week for which there is a state "off" indicator; or

2. The thirteenth consecutive week of such period;

provided, that no extended benefit period may begin by reason of a state "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state.

(b) There is a state "on" indicator for any week if the director determines, in accordance with the regulations of the United States secretary of labor, that for the period consisting of such week and the immediately preceding twelve (12) weeks, the rate of insured unemployment (not seasonally adjusted):

(i) Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding thirteen (13) week period ending in each of the preceding two (2) calendar years and equalled or exceeded five percent (5%); or

(ii) Equalled or exceeded six percent (6%).

(c) There is a state "off" indicator for any week if the director determines, in accordance with the regulations of the United States secretary of labor, that for the period consisting of such week and the immediately preceding

twelve (12) weeks, the rate of insured unemployment (not seasonally adjusted):

- (i) Was less than six percent (6%) and was less than one hundred twenty percent (120%) of the average of such rates for the corresponding thirteen (13) week period ending in each of the preceding two (2) calendar years; or
  - (ii) Was less than five percent (5%).
- (d) "Rate of insured unemployment," for purposes of paragraphs (b) and (c) of this subsection, means the percentage derived by dividing:
- (i) The average weekly number of individuals filing claims for regular compensation in this state for weeks of unemployment for the most recent thirteen (13) consecutive week period, as determined by the director on the basis of his reports to the United States secretary of labor; by
  - (ii) The average monthly employment covered under this chapter for the first four (4) of the most recent six (6) completed calendar quarters ending before the end of such thirteen (13) week period.
- (e) "Regular benefits" means benefits payable to an individual under this chapter or under any other state law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. chapter 85) other than extended benefits.
- (f) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.
- (g) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and, if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.
- (h) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:
- (i) Has received, prior to such week, all of the regular benefits that were available to him under this chapter or any regular or extended benefits available to him under any other state law (including benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. chapter 85) in his current benefit year that includes such week; provided that for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits; or
  - (ii) His benefit year having expired prior to such week, has no or insufficient wages on the basis of which he could establish a new benefit year that would include such week; and
  - (iii) Has no right to unemployment benefits or allowances under the railroad unemployment insurance act and such other federal laws as are specified in regulations issued by the United States secretary of



labor; and has not received and is not seeking unemployment benefits under the unemployment insurance law of Canada; but if he is seeking such benefits and the appropriate agency determines that he is not entitled to benefits under such law he is considered an exhaustee.

(i) "State law" means the unemployment insurance law of any state approved by the United States secretary of labor under section 3304 of the Internal Revenue Code of 1954.

(j) For purposes of this section only, the term "suitable work" means, with respect to any individual, any work which is within such individual's capabilities; except that, if the individual furnishes evidence satisfactory to the department that such individual's prospects for obtaining work in his customary occupation within a reasonably short period are good, the determination of whether any work is suitable work with respect to such individual shall be made in accordance with applicable state law.

(2) Effect of state law provisions relating to regular benefits on claims for, and the payment of, extended benefits. Except when the result would be inconsistent with the other provisions of this section, the provisions of this chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

(3) Eligibility requirements for extended benefits. An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the director finds that with respect to such week:

(a) The claimant is an "exhaustee" as defined in subsection (1)(h) of this section;

(b) The claimant has satisfied the requirements of this chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits;

(c) The claimant has had twenty (20) weeks of full-time employment for covered employers during his base period, or earned wages for services performed for covered employers during his base period equal to at least one and one-half (1½) times his high quarter wages, or has earned wages for services performed for covered employers during his base period equal to at least forty (40) times his most recent weekly benefit amount.

(d)(i) Notwithstanding the provisions of this section, payment of extended benefits under this chapter shall not be made to any individual for any week of unemployment in his eligibility period:

1. During which he fails to accept any offer of suitable work, as defined in subsection (1)(j) of this section, or fails to apply for any suitable work to which he was referred; or

2. During which he fails to actively engage in seeking work.

(ii) If any individual is ineligible for extended benefits for any week by reason of a failure described in subsection (3)(d)(i)1. or (3)(d)(i)2. of this section, the individual shall be ineligible to receive extended benefits for any week which begins during a period which:

1. Begins with the week following the week in which such failure occurs; and

2. Does not end until such individual has been employed during at least four (4) weeks which begin after such failure and the total of the remuneration earned by the individual for being so employed is not less than the product of four (4) multiplied by the individual's average weekly benefit amount.

(iii) Extended benefits shall not be denied under subsection (3)(d)(i)1. of this section to any individual for any week by reason of a failure to accept an offer of, or apply for, suitable work:

1. If the gross average weekly remuneration payable to such individual for the position does not exceed the sum of:

(A) The individual's average weekly benefit amount, as determined for purposes of subsection (b)(1)(C) of section 202 of the federal-state extended unemployment compensation act of 1970, for his benefit year; plus

(B) The amount, if any, of supplemental unemployment compensation benefits, as defined in section 501(c)(17)(D) of the Internal Revenue Code of 1954, payable to such individual for such week.

2. If the position was not offered to such individual in writing or was not listed with the department;

3. If such failure would not result in a denial of benefits under the provisions of this chapter to the extent that such provisions are not inconsistent with the provisions of subsections (1)(j) and (3)(d)(iv) of this section; or

4. If the position pays wages less than the higher of:

(A) The minimum wage provided by section 6(a)(1) of the fair labor standards act of 1938, without regard to any exemption; or

(B) Any applicable state or local minimum wage.

(iv) For purposes of this paragraph, an individual shall be treated as actively engaged in seeking work during any week if:

1. The individual has engaged in a systematic and sustained effort to obtain work during such week; and

2. The individual provides tangible evidence to the department that he has engaged in such an effort during such week.

(v) For purposes of this section only, the department shall refer applicants for extended benefits to any suitable work to which paragraphs 1., 2., 3. and 4. of subsection (3)(d)(iii) of this section would not apply.

(4)(a) Except as provided in paragraph (b) of this subsection, payment of extended benefits shall not be made to any individual for any week if:

(i) Extended benefits would, but for this subsection have been payable for such week pursuant to an interstate claim filed in any state under the interstate benefit payment plan; and

(ii) An extended benefit period is not in effect for such week in such state.

(b) Paragraph (a) of this subsection shall not apply with respect to the first two (2) weeks for which extended benefits are payable, determined without regard to this subsection, pursuant to an interstate claim filed under the interstate benefit payment plan to the individual from the extended benefits account established for the benefit year.



(c) Section 3304(a)(9)(A) of the Internal Revenue Code of 1954 shall not apply to any denial of benefits required under this subsection.

(5) Weekly extended benefit amount. The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year.

(6) Total extended benefit amount. The total extended benefit amount payable to an eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

(a) Fifty percent (50%) of the total amount of regular benefits which were payable to him under this chapter in his applicable benefit year;

(b) Thirteen (13) times his weekly benefit amount which was payable to him under this chapter for a week of total unemployment in the applicable benefit year;

(c) Provided that the amount so determined shall be reduced by the total amount of extended benefits paid, or being paid, to the individual for weeks of extended unemployment in the individual's benefit year which began prior to the effective date of the federal-state extended benefit period which is current in the week for which the individual first claims such benefits.

(d) Notwithstanding any other provisions of this chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for the provisions of this section, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced, but not below zero, by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

(7)(a) Beginning and termination of extended benefit period. Whenever an extended benefit period is to become effective in this state as a result of a state "on" indicator, or an extended benefit period is to be terminated in this state as a result of a state "off" indicator, the director shall make a public announcement.

(b) Computations required by the provisions of subsection (1)(d) of this section shall be made by the director, in accordance with regulations prescribed by the United States secretary of labor.

(8) Notwithstanding any other provisions of this chapter, none of the benefits paid pursuant to the provisions of this section shall be charged to an employer's account for purposes of experience rating.

(9) Whenever a program of unemployment benefits becomes available that is financed entirely by the federal government, and such program will not allow payments to individuals who are entitled to extended benefits pursuant to this section, the governor may, by executive order, trigger off an extended benefit period as defined in subsection (1)(a) of this section in order to provide payment of such federal benefits to individuals who have exhausted their right to regular benefits. When the federal benefits are exhausted, or if the director determines that payment of extended benefits

would be more economically advantageous to the state of Idaho, the governor shall, by executive order, trigger extended benefits on if the criteria of subsection (1)(b) of this section are otherwise met.

(10) Until conformity with the federal-state extended unemployment compensation act of 1970 requires otherwise, the eligibility requirements in subsections (1)(j) and (3)(d) of this section are suspended. Except where inconsistent with the provisions of this section, the eligibility requirements of section 72-1366, Idaho Code, applicable to claims for regular benefits shall apply in lieu of the suspended provisions. [I.C., § 72-1367A, as added by 1971, ch. 4, § 2, p. 6; am. 1975, ch. 127, § 1, p. 275; am. 1977, ch. 179, § 17, p. 464; am. 1978, ch. 112, § 11, p. 232; am. 1981, ch. 168, § 1, p. 294; am. 1982, ch. 326, § 11, p. 807; am. 1992, ch. 12, § 1, p. 26; am. 1993, ch. 10, § 2, p. 30; am. 1993, ch. 20, § 1, p. 73; am. 1998, ch. 1, § 86, p. 3.]

### STATUTORY NOTES

**Prior Laws.** — Former § 72-1367A, which comprised I.C., § 72-1367A, as added by 1959, ch. 62, § 1, p. 111; 1961, ch. 3, § 1, p. 5; 1967, ch. 117, § 11, p. 233, was repealed by S.L. 1971, ch. 4, § 1.

**Amendments.** — This section was amended by two 1993 acts — ch. 10, § 2, effective March 8, 1993, and ch. 20, § 1, effective July 1, 1993 — which do not appear to conflict and have been compiled together.

The 1993 amendment, by ch. 10, § 2, at the end of subsection (c)(1) added “of this section”; in subsection (c)(4)(A)1. added “of this section” following “subsection (a)(10)”; in subsection (c)(4)(B) substituted “of this section” for “hereof”; in subsection (c)(4)(C) added “of this section” preceding “to any individual”; in subsection (c)(4)(E) added “of this section” preceding “would not apply.”; near the beginning of subsection (d)(2) added “of this subsection”; in subsection (g)(2) added “of this section” preceding “shall be made”; and added subsection (j).

The 1993 amendment, by ch. 20, § 1, in subsection (c)(3) added “had twenty (20) weeks of full-time employment for covered employers during his base period, or” following “He has”; and added at the end of subsection (c)(3) “, or has earned wages for services performed for covered employers during his base period equal to at least forty (40) times his most recent weekly benefit amount”.

**Federal References.** — The railroad unemployment insurance act, referred to in sub-

division (a)(8)(C) of this section, is compiled as 45 U.S.C. §§ 351 — 368.

Section 3304 of the Internal Revenue Code of 1954 referred to in subdivision (1)(i) of this section, is compiled as 26 U.S.C. § 3304.

Section 501(c)(17)(D) of the Internal Revenue Code of 1954, referred to in subdivision (3)(d)(iii)1.(B) of this section, is compiled as 26 U.S.C. § 501(c)(17)(D).

Section 3304(a)(9)(A) of the Internal Revenue Code, referred to in subdivision (4)(c) of this section is compiled as 26 U.S.C. § 3304(a)(9)(A).

Section 6(a)(1) of the fair labor standards act of 1938, referred to in subdivision (3)(d)(iii)4.(A) of this section, is compiled as 29 U.S.C. § 206.

Section 202 of the federal-state extended unemployment compensation act of 1970, referred to in subdivision (3)(d)(iii)1.(A) of this section, is compiled as 26 U.S.C. § 3304.

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 3 of S.L. 1971, ch. 4 declared an emergency. Approved February 3, 1971.

Section 2 of S.L. 1975, ch. 127 declared an emergency. Approved March 26, 1975.

Section 12 of S.L. 1978, ch. 112 declared an emergency. Approved March 14, 1978.

Section 2 of S.L. 1992, ch. 12 declared an emergency. Approved February 27, 1992.

Section 3 of S.L. 1993, ch. 10 declared an emergency. Approved March 8, 1993.



**72-1367B. Additional extended benefits — Charge benefits paid — Termination of benefits. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1367B, as added by 1982, ch. 32, § 1, p. 61, was repealed by S.L. 1993, ch. 20, § 2, effective July 1, 1993.

**72-1368. Claims for benefits and appellate procedure. —**

(1) Claims for benefits shall be made in accordance with such rules as the director may prescribe.

(2) Each employer shall post and maintain in places readily accessible to individuals performing services for him printed statements concerning benefit rights under this chapter which shall be provided by the department without cost to the employer.

(3) A representative of the department hereinafter referred to as a claims examiner shall examine a claim filed pursuant to subsection (1) of this section and, on the basis of the facts found by him, shall determine whether the claimant is eligible for benefits and, if eligible, the date his benefit year begins, the weekly benefit amount, the total benefit amount, the base period wages, and the base period covered employers. In the event of a denial of benefits, the determination shall include the reasons for the ineligibility. Before the determination becomes final or an appeal is filed, the claims examiner, on his own motion, may issue a revised determination. The determination or revised determination shall become final unless, within fourteen (14) days after notice, as provided in subsection (5) of this section, an appeal is filed by an interested party with the department.

(4) The director may make a special redetermination whenever he finds that a departmental error has occurred in connection with a determination, or that additional wages of the claimant or other facts pertinent to such determination have become available or have been newly discovered, or that benefits have been allowed or denied or the amount of benefits fixed on the basis of nondisclosure or misrepresentation of fact. The special redetermination must be made within one (1) year from the date of the original determination, except that a special redetermination involving a finding that benefits have been allowed or denied or the amount of benefits fixed on the basis of nondisclosures or misrepresentations of fact may be made within two (2) years from the date of the original determination. Subject to the same limitations and for the same reasons, the director may make a special redetermination in any case in which the final decision has been rendered by an appeals examiner, the commission, or a court and may apply to the appeal tribunal which rendered such final decision to issue a revised decision. In the event that an appeal involving an original determination is pending as of the date a special redetermination is issued, the appeal, unless withdrawn, shall be treated as an appeal from the special redetermination.

(5) All interested parties shall be entitled to prompt service of notice of determinations and decisions. A notice shall be deemed served if delivered to the person being served or if mailed to his last known address; service by mail shall be deemed complete on the date of mailing.

(6) To hear and decide appeals from determinations and redeterminations, the director shall appoint appeals examiners. Unless the appeal is withdrawn, the appeals examiner shall affirm, modify, set aside or reverse the determination or redetermination involved, after affording the interested parties reasonable opportunity for a fair hearing, or may refer a matter back to the claims examiner for further action. The appeals examiner shall notify the interested parties of his decision by serving notice in the same manner as provided in subsection (5) of this section. The decision shall set forth findings of fact and conclusions of law. The appeals examiner may, either upon application for rehearing by an interested party or on his own motion, rehear, affirm, modify, set aside or reverse any prior decision on the basis of the evidence previously submitted or on the basis of additional evidence; provided, that such application or motion be made within ten (10) days after the date of service of the decision. A complete record shall be kept of all proceedings in connection with an appealed claim. All testimony at any hearing shall be recorded. If a claim for review of the appeals examiner's decision is filed with the commission, the testimony shall be transcribed if ordered by the commission. Witnesses subpoenaed by the appeals examiner shall be allowed fees at a rate prescribed by the director. If any interested party to a hearing formally requests the appeals examiner to issue a subpoena for a witness whose evidence is deemed necessary, the appeals examiner shall promptly issue the subpoena, unless such request is determined to be unreasonable. Unless an interested party shall within fourteen (14) days after service of the decision of the appeals examiner file with the commission a claim for review or unless an application or motion is made for a rehearing of such decision, the decision of the appeals examiner shall become final.

(7) The commission shall decide all claims for review filed by any interested party in accordance with its own rules of procedure not in conflict herewith. The record before the commission shall consist of the record of proceedings before the appeals examiner, unless it appears to the commission that the interests of justice require that the interested parties be permitted to present additional evidence. In that event, the commission may, in its sole discretion, conduct a hearing or may remand the matter back to the appeals examiner for an additional hearing and decision. On the basis of the record of proceedings before the appeals examiner as well as additional evidence, if allowed, the commission shall affirm, reverse, modify, set aside or revise the decision of the appeals examiner or may refer the matter back to the appeals examiner for further proceedings. The commission shall file its decision and shall promptly serve notice of its decision to all interested parties. A decision of the commission shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision, any party may move for reconsideration of the decision or the commission may rehear or reconsider its decision on its own initiative. The decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on reconsideration.



(8) No person acting on behalf of the director or any member of the commission shall participate in any case in which he has a direct or indirect personal interest.

(9) An appeal may be made to the Supreme Court from decisions and orders of the commission within the times and in the manner prescribed by rule of the Supreme Court.

(10)(a) Benefits shall be paid promptly in accordance with any decision allowing benefits, regardless of:

(i) The pendency of a time period for filing an appeal or petitioning for commission review; or

(ii) The pendency of an appeal or petition for review.

(b) Such payments shall not be withheld until a subsequent appeals examiner decision or commission decision modifies or reverses the previous decision, in which event benefits shall be paid or denied in accordance with such decision.

(11)(a) Any right, fact, or matter in issue, directly based upon or necessarily involved in a determination, redetermination, decision of the appeals examiner or decision of the commission which has become final, shall be conclusive for all the purposes of this chapter as between the interested parties who had notice of such determination, redetermination or decision. Subject to appeal proceedings and judicial review by the Supreme Court as set forth in this section, any determination, redetermination or decision as to rights to benefits shall be conclusive for all purposes of this chapter and shall not be subject to collateral attack irrespective of notice.

(b) No finding of fact or conclusion of law contained in a decision or determination rendered pursuant to this chapter by an appeals examiner, the industrial commission, a court, or any other person authorized to make such determinations shall have preclusive effect in any other action or proceeding, except proceedings that are brought (i) pursuant to this chapter, (ii) to collect unemployment insurance contributions, (iii) to recover overpayments of unemployment insurance benefits, or (iv) to challenge the constitutionality of provisions of this chapter or administrative proceedings under this chapter.

(12) The provisions of the Idaho administrative procedure act, chapter 52, title 67, Idaho Code, regarding contested cases and judicial review of contested cases are inapplicable to proceedings involving claimants under the provisions of this chapter. [1947, ch. 269, § 68, p. 793; am. 1949, ch. 144, § 68, p. 252; am. 1951, ch. 104, § 15, p. 233; am. 1965, ch. 203, § 7, p. 456; am. 1972, ch. 344, § 5, p. 998; am. 1973, ch. 89, § 2, p. 146; am. 1977, ch. 300, § 2, p. 838; am. 1980, ch. 264, § 11, p. 682; am. 1982, ch. 296, § 1, p. 755; am. 1989, ch. 57, § 9, p. 78; am. 1993, ch. 119, § 4, p. 297; am. 1998, ch. 1, § 87, p. 3; am. 2001, ch. 37, § 1, p. 68.]

## STATUTORY NOTES

**Cross References.** — Interested parties defined, § 72-1323.

**Effective Dates.** — Section 6 of S.L. 1972, ch. 344 declared an emergency. Approved March 31, 1972.

Section 2 of S.L. 2001, ch. 37 declared an emergency. Approved March 8, 2001.

## JUDICIAL DECISIONS

### ANALYSIS

Attorneys fees.  
 Appeals.  
 Application of service by mail.  
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 Evidence.  
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 Questions of law.  
 Redetermination of rate.  
 Rehearing.  
 Remand.  
 Repayment.  
 Substantial evidence.  
 Supplemental hearing.

### Attorneys Fees.

Where a claimant for unemployment benefits does not file a complaint pursuant to I.R.C.P. 3(a), but files claims for benefits according to this section, the claim for unemployment benefits does not constitute a civil action for which attorney fees can be awarded pursuant to § 12-121. *Johnson v. Idaho Cent. Credit Union*, 127 Idaho 867, 908 P.2d 560 (1995).

### Appeals.

The condition of claimant's health and ability to work is a question of fact for the industrial accident board whose finding based on substantial and competent evidence will not be disturbed on review. *Turner v. Boise Lodge No. 310*, 77 Idaho 465, 295 P.2d 256 (1956).

Where the industrial accident board's findings were supported by substantial and competent evidence, they will not be disturbed on appeal. *Bean v. Employment Sec. Agency*, 81 Idaho 551, 347 P.2d 339 (1959); *Boodry v. Eddy Bakeries Co.*, 88 Idaho 165, 397 P.2d 256 (1964).

On appeal from the industrial accident board's determination on questions of unemployment benefits, the jurisdiction of the Su-

preme Court is limited to a review of questions of law. *Cahoon v. Employment Sec. Agency*, 82 Idaho 224, 351 P.2d 477 (1960); *Boodry v. Eddy Bakeries Co.*, 88 Idaho 165, 397 P.2d 256 (1964).

Except where the right of appeal is secured by the Constitution, so as to have become a constitutional right, it is dependent entirely upon the statute and is subject to the control of the legislature which may, in its discretion, grant or take away the remedy and prescribe in what cases, under what circumstance, in what manner and to and from what courts appeals may be taken. *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961).

It is clear the legislature intended that for the purpose of perfecting an appeal as provided in this section, service of a notice of determination or redetermination shall be regarded and adjudged as complete when delivered to the person being served or on the date of mailing if mailed to such person at his last known address. It is equally clear that the legislature did not intend to leave the right of appeal open beyond the 14 day period provided by this section. *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961).



Where appellant failed to appeal from the redetermination decision (copy of which was mailed to her under date of Nov. 18, 1960) within the 14 day period provided by this section, she lost her right to have such decision reviewed regardless of her statements that she did not understand that she had to file a request for appeal within 14 days of determination of noneligibility for benefits. *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961).

In unemployment compensation appeals the Supreme Court is restricted to deciding questions of law and will not disturb the factual findings of the board though based on conflicting evidence. *Toland v. Schneider*, 94 Idaho 556, 494 P.2d 154 (1972).

Where only claimant appeared and testified before the industrial commission reiterating his statements made to the appeals examiner and employer did not appear before the commission, findings of the commission not supported by substantial, competent evidence are not binding on appeal. *Mata v. Broadmore Homes*, 95 Idaho 873, 522 P.2d 586 (1974).

On appeal the court is not bound by the industrial commission's view of the testimony where the commission has not observed the witnesses but is only reviewing the record. *Clay v. Crooks Indus.*, 96 Idaho 378, 529 P.2d 774 (1974).

Where a decision rendered in November 1973 was set aside and a new order issued on rehearing in January 1974, an appeal filed immediately after the order on rehearing was not timely as the 30-day time limit for filing an appeal pursuant to (former) § 72-725 began running from the November order. *Department of Emp. v. St. Alphonsus Hosp.*, 96 Idaho 470, 531 P.2d 232 (1975).

Since the statutory requirements governing the right to appeal under this section are mandatory and jurisdictional, a claimant who failed to appeal a determination of ineligibility within 14 days after notice was mailed lost her right to have the determination of ineligibility reviewed, even though claimant did not receive notice of the determination until after the prescribed 14-day period. *Fouste v. Department of Emp.*, 97 Idaho 162, 540 P.2d 1341 (1975).

In reviewing industrial commission ruling that claimant had failed to sustain his burden of showing good cause for his voluntary termination of employment, the Supreme Court would not consider evidence indicating that claimant's wife was ill, where such evidence was not before the hearing examiner or the industrial commission. *Flynn v. Amfac Foods, Inc.*, 97 Idaho 768, 554 P.2d 946 (1976).

Under the department of employment's regulations, the date of the postmark on a claim for review pursuant to this section is deemed to be the date of its filing with the industrial

commission. *Department of Emp. v. Drinkard*, 98 Idaho 222, 560 P.2d 1312 (1977).

Where the decision of the appeals examiner was mailed before its effective date, such service could not activate the running of the 14-day appeal period any sooner than the date the decision was rendered, as appeared on the face of the decision itself. *Department of Emp. v. Drinkard*, 98 Idaho 222, 560 P.2d 1312 (1977).

Where a claimant for unemployment benefits left town without leaving a change of address, so that the efforts of the department of employment to notify him of a redetermination were unsuccessful, the claimant's failure to appeal the redetermination within 14 days foreclosed his right to review. *Hacking v. Department of Emp.*, 98 Idaho 839, 573 P.2d 158 (1978).

This section is not a carte blanche allowing an employer the unbridled right to present a substantially new case absent some showing as to why the evidence was unavailable earlier. *White v. Idaho Forest Indus.*, 98 Idaho 784, 572 P.2d 887 (1977).

Findings of fact by the industrial commission will not be disturbed when supported by substantial and competent evidence. *Hutchinson v. J.R. Simplot Co.*, 98 Idaho 346, 563 P.2d 404 (1977); *Simmons v. Department of Emp.*, 99 Idaho 290, 581 P.2d 336 (1978).

The industrial commission's findings of fact will be sustained if supported by substantial and competent evidence. *Rogers v. Trim House*, 99 Idaho 746, 588 P.2d 945 (1979).

This section together with the inappropriateness of judicial review of questions of fact, militates against assuming an expanded scope of appellate review in unemployment compensation cases involving factual disputes, regardless of whether witnesses have personally appeared before the industrial commission; the court therefore declines to independently adopt findings of fact at variance with those of the industrial commission where such findings are supported by substantial and competent evidence in the record. *Booth v. City of Burley*, 99 Idaho 229, 580 P.2d 75 (1978).

Where the claimant was never notified at any stage in the appellate proceedings that any issue concerning any eligibility requirement existed, other than the issue of self employment, it was error for the commission to remand the unemployment compensation matter to the Department of Employment for additional findings as to whether the claimant was available for work and seeking work during her period of unemployment. *Colvard v. Department of Emp.*, 98 Idaho 868, 574 P.2d 910 (1978).

Whether or not witnesses appear before the industrial commission, appellate review by the supreme court is restricted to reviewing

questions of law. *Simmons v. Department of Emp.*, 99 Idaho 290, 581 P.2d 336 (1978).

Hearings before the appeals examiner and before the industrial commission are in the nature of trials de novo since additional evidence can be presented at such hearings. *Ortiz v. Armour & Co.*, 100 Idaho 363, 597 P.2d 606 (1979).

This section deals with service of notice of determinations and redeterminations by Department of Employment, not appeals by interested parties. *Hill v. State, Dep't of Emp.*, 116 Idaho 727, 779 P.2d 402 (1989).

Section 72-719(3) does not give the industrial commission the authority to rescind a prior order that has become final and conclusive for all purposes once the time for appeal has expired under the Employment Security Law. Although § 72-719(3), part of Idaho's comprehensive Worker's Compensation Law, provides for correction due to manifest injustice, there is no corresponding statute under Idaho's Employment Security Law. *Welch v. Del Monte Corp.*, 128 Idaho 513, 915 P.2d 1371 (1996).

Because no motion for reconsideration or appeal was filed during the 50-day interim between the issuance of the industrial commission's order denying claimant's motion for reconsideration of department's conclusion that he was discharged for misconduct and its order purporting to set aside the prior order, its findings of facts as to both orders are conclusive for all purposes of the Employment Security Law. *Welch v. Del Monte Corp.*, 128 Idaho 513, 915 P.2d 1371 (1996).

#### **Application of Service by Mail.**

Subsection (f) (now (6)) of this section refers to subsection (e) (now (5)) of this section only in terms of an appeals examiner serving notice of his decision. There is no indication in either subsection (e) or (f) (now (5) or (6)) that the service by mail provisions referred to there were intended to apply to appeals. *Hill v. State, Dep't of Emp.*, 116 Idaho 727, 779 P.2d 402 (1989).

#### **Commission's Scope of Review.**

In enacting this section, the legislature provided that the industrial commission's review would be based upon the record of the proceedings before the appeals examiner. The industrial commission's responsibility and scope of review in employment compensation claims is clearly set forth in this section. *Steffen v. Davison, Copple, Copple & Copple*, 120 Idaho 129, 814 P.2d 29 (1991).

This section did not bar industrial commission's de novo review of appeals examiner's decision, because: the examiner's decision was not final, the Employment Security Law contemplates a unified statutory scheme, and, as the ultimate factfinder for determining eligibility status, the commission is entitled

to consider all the evidence and issues presented to the appeals examiner. *Scrivner v. Service IDA Corp.*, 126 Idaho 954, 895 P.2d 555 (1995).

Because this section applies only to "additional evidence" and there was no indication that the industrial commission considered a letter, which claimant included with his appeal to the Commission of his denial of unemployment benefits, as additional evidence in reaching its decision, the Commission was not required to strike the letter requesting review. *Dietz v. Minidoka County Hwy. Dist.*, 127 Idaho 246, 899 P.2d 956 (1995).

#### **Constitutionality.**

It was permissible for this section to exclude daytime but not nighttime students from eligibility for unemployment benefits, since the legislature could rationally conclude that daytime work is far more plentiful than nighttime work and that consequently daytime students restrict the range of jobs open to them; and the fact that the classification is imperfect because some daytime students actually find job opportunities more numerous at night does not invalidate the statute under U.S. Const., amend. XIV. *Idaho Dep't of Emp. v. Smith*, 434 U.S. 100, 98 S. Ct. 327, 54 L. Ed. 2d 324 (1977).

The due process clause of U.S. Const., amend. 14 did not invalidate the provision of this section that service by mail of a redetermination notice be deemed complete on a date of mailing, even where the recipient's absence from town on the day of delivery prevented him from making a timely response, since an otherwise fair notice procedure cannot be invalidated because of the recipient's unavailability to receive his own mail. *Gary v. Nichols*, 447 F. Supp. 320 (D. Idaho 1978).

#### **Construction.**

The word "deemed" as used in part (c) [now (5)] of this section is to be interpreted as creating a conclusive presumption. *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961).

The Employment Security Law must be liberally construed to the end that its purpose be accomplished as the primary function in construing the statute is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Striebeck v. Employment Sec. Agency*, 83 Idaho 531, 366 P.2d 589 (1961).

#### **Decision of Commission.**

The commission is not required to make specific findings of fact. *Clark v. Bogus Basin Recreational Ass'n*, 91 Idaho 916, 435 P.2d 256 (1967).

#### **Employment-Related Misconduct.**

The industrial commission found that claimant's leaving of business checkbook with



signed blank checks unattended as in direct contravention of the directions of the employer and allowing the service station gas tanks to become empty on several occasions was behavior constituting employment-related misconduct warranting his discharge thus precluding him from receiving unemployment compensation benefits. *Spruell v. Allied Meadows Corp.*, 117 Idaho 277, 787 P.2d 263 (1990).

Where there was substantial and competent evidence to support the commission's findings that the employer became dissatisfied with the employee's work performance after patients were lost due to her making contact at the patients' places of employment and treating patients in a rude and abusive manner, and the employer received complaints about her from patients and co-employees, the commission properly denied the employee unemployment compensation benefits because she was discharged for misconduct. *Lang v. Ustick Dental Office*, 120 Idaho 545, 817 P.2d 1069 (1991).

#### **Evidence.**

Action of appeals examiner in supporting his decision by reference to a letter not in evidence before him did not prejudice claimant because claimant had been afforded opportunity at hearing before industrial accident board to refute the evidence upon which the examiner had found him ineligible for benefits. *Norman v. Employment Sec. Agency*, 83 Idaho 1, 356 P.2d 913 (1960).

Evidence that telephone operators made personal long-distance calls, without recording the same, at night when no supervisor was present and the exchange was in charge of the senior operator present and that this practice was expressly prohibited by a book of rules and regulations supplied each operator was sufficient to support the board's finding that the company did not have such knowledge of this practice that it must be taken to have permitted, tolerated, or condoned the practice. *Alder v. Mountain States Tel. & Tel. Co.*, 92 Idaho 506, 446 P.2d 628 (1968).

Where record demonstrated that school district's counsel was aware of prior agreement and recommendation of discharge some four months before hearing to discharge teacher and the transcript of the hearing which resulted in teacher's discharge indicated that school district's counsel specifically referred to such document in his opening statement, the industrial commission reasonably ruled that the district could have discovered such prior recommendation of discharge before the hearing with the exercise of reasonable diligence, and thus commission's refusal to augment the record with the recommendation was not an abuse of discretion. *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 933 P.2d 642 (1997).

This section does not require the industrial commission to consider additional evidence. Instead, it allows the Commission to receive new evidence that was unavailable at the time of the hearing before the appeals examiner; it is not *carte blanche* allowing a party the unbridled right to present a substantially new case, absent some showing of why the evidence had not been available earlier. *Teevan v. Office of Att'y Gen.*, 130 Idaho 79, 936 P.2d 1321 (1997).

Trial court did not abuse its discretion in denying the employee's request for a hearing to supplement the record where the employee knew, when he filed the notice of appeal from the decision of the claims examiner, the employee needed additional information from the physician in order to support his claim; the employee failed to explain to the Idaho industrial commission why he did not provide the evidence while the record was still open because the employee had adequate time and access to the physician to obtain the necessary information regarding a change in employment prior to the Appeals Examiner's hearing. *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 67 P.3d 1265 (2003).

#### **Exhibits.**

Where the claimant did not object when certain exhibits were introduced into the record by the appeals examiner, thereafter, the referee and the industrial commission were required to include such exhibits as part of the record of the proceedings before the commission. *Guillard v. Department of Emp.*, 100 Idaho 647, 603 P.2d 981 (1979).

#### **Fair Hearing.**

An unemployment compensation claimant who failed to utilize the clearly established procedures for appealing a determination of ineligibility within the 14-day time limitation was not denied a fair hearing at the appeals level as required by the Social Security Act (42 U.S.C. § 503(a)(3)). *Fouste v. Department of Emp.*, 97 Idaho 162, 540 P.2d 1341 (1975).

The appeal process pursuant to this statute satisfied the "fair hearing" requirement of the Social Security Act provision in 42 U.S.C. § 503(a)(3). *Fouste v. Department of Emp.*, 97 Idaho 162, 540 P.2d 1341 (1975).

#### **Limitations.**

Although debt to unemployment security fund of claimant who applied for unemployment benefits was not enforceable because of the expiration of the period of limitations, the debt was not extinguished by the expiration of the period of limitations and could be offset against any future benefits payable to claimant. *Norton v. Department of Emp.*, 94 Idaho 924, 500 P.2d 825 (1972).

The three year period of limitations prescribed in § 5-218 is applicable to an action

brought by or for the benefit of the state to recover unemployment benefits fraudulently obtained. *Norton v. Department of Emp.*, 94 Idaho 924, 500 P.2d 825 (1972).

### **Misrepresentation.**

Claimant was not required to refund payments received for unemployment after leaving large city and moving to small town where he stated in claim that he was available for work and was looking for work even though subsequent claim was denied on the ground that he was not at a point where there was an available labor market, since claim on which he received payment was not received as the result of a misrepresentation of a material fact. *Claim of Sapp*, 75 Idaho 65, 266 P.2d 1027 (1954).

Claimant, a carpenter, upon termination of his employment by reason of the completion of the project, filed claim for unemployment benefits and was thereafter paid benefits. Excluding a short employment interval and vacation period, the unemployed carpenter commenced constructing a dwelling on two lots he owned doing this in his spare time while unemployed and such was held to be an increment of his estate equal to, if not greater, than the wages he would have been required to pay other artisans to work for him and he was held fully employed and receiving actual wages, and therefore not entitled to compensation benefits, but since he had received them in good faith was not required to repay benefits received. *Hatch v. Employment Sec. Agency*, 79 Idaho 246, 313 P.2d 1067 (1957).

### **New Evidence.**

While the industrial commission has the discretion to receive new evidence during a proceeding before it, this section does not mandate the reception of new evidence. *Rogers v. Trim House*, 99 Idaho 746, 588 P.2d 945 (1979).

Where the claimant himself produces evidence that might form an additional basis for the denial of benefits, the additional issue should be called to the attention of the hearing examiner and thus permit him an opportunity to rehear, affirm, modify, set aside or reverse any prior decision on the basis of the evidence previously submitted in such case or on the basis of additional evidence; and the claimant must also be given notice and a fair opportunity to meet the issue. *Luskin v. Department of Emp.*, 100 Idaho 584, 602 P.2d 947 (1979).

The industrial commission did not abuse its discretion in refusing the employer an opportunity to present additional evidence before the Commission where the employer gave no reason for its failure to appear at the telephone hearing and the claims examiner's initial decision was based upon written explanations submitted by each party. *Harris v. Beco*

*Corp.*, 110 Idaho 28, 713 P.2d 1387 (1986).

### **Prejudicial Evidence.**

An unemployment compensation claimant was not prejudiced by the admission of exhibits, where there was absolutely no indication that the appeals examiner or the industrial commission relied to any extent on the exhibits, but to the contrary, the commission relied exclusively on the claimant's statements made at the hearings on the record. *Guillard v. Department of Emp.*, 100 Idaho 647, 603 P.2d 981 (1979).

### **Questions of Law.**

Where industrial accident board upheld the decision of the employment security agency, and the evidence without substantial conflict, a question of law was presented for the Supreme Court as to whether it will support the conclusion reached by the board. *In re Pacific Nat'l Life Assurance Co.*, 70 Idaho 98, 212 P.2d 397 (1949).

Where facts were sufficient to support the finding of the appeals examiner and the board, the jurisdiction of the Supreme Court being limited to review of questions of law only, the board's findings would not be disturbed. *Watts v. Employment Sec. Agency*, 80 Idaho 529, 335 P.2d 533 (1959).

### **Redetermination of Rate.**

Failure of employer to file application for redetermination of 1947 rate was not binding where it protested that erroneous charges had been used in determination of rate, since rate in 1947 was 1.1, the lowest possible rate under the statute. *In re Potlatch Forests, Inc.*, 72 Idaho 291, 240 P.2d 242 (1952).

### **Rehearing.**

The board under its granted broad powers was clearly authorized to rehear the entire controversy of the determination by the chief of contributions that the involved corporation was ineligible for reduced contribution rate, to make its own findings of fact and draw its own conclusions and was not limited to questions of law. *In re Markham's, Inc.*, 79 Idaho 307, 316 P.2d 553 (1957).

Former subsection (g) of this section does not give, by implication, the commission power to grant a rehearing. *Department of Emp. v. St. Alphonsus Hosp.*, 96 Idaho 470, 531 P.2d 232 (1975).

### **Remand.**

Where a second hearing examiner and the industrial commission lacked the power to adjudicate the issue of a claimant's alleged fabrication, the orders of the industrial commission would be reversed and remanded for further proceedings. *Luskin v. Department of Emp.*, 100 Idaho 584, 602 P.2d 947 (1979).

Where the industrial commission found that the claimant voluntarily resigned from



her position but the record did not reveal whether good cause was shown, the question of the claimant's eligibility for benefits was not fully resolved by the commission, and the Supreme Court would remand to the commission to make the determination under this section of whether the claimant was eligible. *Tendoy Area Council v. State, Dep't of Emp.*, 105 Idaho 517, 670 P.2d 1302 (1983).

Appellate court could not remand the employee's case for a new hearing pursuant to § 72-1368(4) because the appellate court could not review the Director of the Idaho department of labor's denial of a request for such a redetermination, and there was nothing in the record showing that any such request was made. *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 67 P.3d 1265 (2003).

### Repayment.

It is discretionary with the director as to whether refund will be required or waived, and unless the director directs repayment or deductions from future benefits, repayment would be waived. *Cahoon v. Employment Sec. Agency*, 82 Idaho 224, 351 P.2d 477 (1960).

### Substantial Evidence.

Where claimant took his pregnant wife to the hospital and remained with her during her illness before returning to work and employer had a rule that permission must be received from the supervisor or assistant superintendent for all absences, evidence that claimant notified his employer by phone of his absence on the second day of his absence and that claimant's sister telephoned the employer at 8:00 a.m. each day claimant was absent and notified the assistant superinten-

dent of claimant's absence and on each occasion the assistant superintendent, after being so notified of the intended absence, said it was alright and was substantial and competent and supported finding of commission that claimant notified his employer of the absences and thus claimant was entitled to unemployment benefits for his discharge from employment. *Simmons v. Department of Emp.*, 99 Idaho 290, 581 P.2d 336 (1978).

### Supplemental Hearing.

A claimant's disagreement with the appeals examiner's decision is not a proper basis for a supplemental hearing. *Teevan v. Office of Att'y Gen.*, 130 Idaho 79, 936 P.2d 1321 (1997).

The Court of Appeals reviews the industrial commission's decision regarding supplemental hearings under the abuse of discretion standard. *Teevan v. Office of Att'y Gen.*, 130 Idaho 79, 936 P.2d 1321 (1997).

**Cited in:** *Ramsey v. Employment Sec. Agency*, 85 Idaho 395, 379 P.2d 797 (1963); *Link's Sch. of Bus. v. Emp. Sec. Agency*, 85 Idaho 519, 380 P.2d 506 (1963); *Levesque v. Hi-Boy Meats, Inc.*, 95 Idaho 808, 520 P.2d 549 (1974); *Hutchinson v. J.R. Simplot Co.*, 98 Idaho 346, 563 P.2d 404 (1977); *Foote v. Gritman Mem. Hosp.*, 101 Idaho 93, 609 P.2d 160 (1980); *Gray v. Brasch & Miller Constr. Co.*, 102 Idaho 14, 624 P.2d 396 (1981); *Nielson v. State, Indus. Special Indem. Fund*, 106 Idaho 878, 684 P.2d 280 (1984); *Jensen v. Siemsen*, 118 Idaho 1, 794 P.2d 271 (1990); *Housing Auth. v. State, Dep't of Emp.*, 119 Idaho 639, 809 P.2d 500 (1991); *DesFosses v. State, Dep't of Emp.*, 123 Idaho 746, 852 P.2d 498 (1993); *Moore v. Melaleuca, Inc.*, 137 Idaho 23, 43 P.3d 782 (2002).

## DECISIONS UNDER PRIOR LAW

### ANALYSIS

Appeals.  
Eligibility.  
Excessive penalties.  
Findings.  
Intent of legislature.  
Jurisdiction.  
Vested right to benefits.

### Appeals.

The constitutional amendment authorizing appeal from industrial accident board direct to Supreme Court was intended to include cases in both industrial accident matters and also unemployment compensation cases. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

### Eligibility.

The question of whether a claimant is eligible for compensation payments depends upon an interpretation of the Unemployment Compensation Law and not upon application of the common law. *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947).

Employee who failed to follow procedure of

union in presenting grievance was not guilty of misconduct which would disqualify him from receiving benefits after his discharge. *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947).

#### **Excessive Penalties.**

Where no penalties had been assessed under the unemployment compensation statute, the question of whether excessive penalties were authorized thereunder so as to render the statute unconstitutional was not properly before the court on appeal. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

#### **Findings.**

Where the trial court has not seen or heard the witnesses and the findings are based upon depositions, the appellate court is in as favorable position to weigh the evidence as the trial judge, whose findings then are not conclusive on the Supreme Court. *Phipps v. Boise St. Car Co.*, 61 Idaho 740, 107 P.2d 148 (1940).

The Supreme Court is equally bound by findings of fact made by industrial accident board in both cases involving unemployment and industrial accident. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

#### **Intent of Legislature.**

It is clear that the legislature intended that a claimant should be entitled to compensation benefits if his discharge or unemployment was not due to his own conduct. *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947).

#### **Jurisdiction.**

The courts were not divested of jurisdiction where the administration of the Unemployment Compensation Law was placed with the industrial accident board, and there was no violation of due process in denying persons right to be heard by impartial trial, since the board is not an adversary. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

Under Unemployment Compensation Law, the district court had jurisdiction to construe the law and pass upon its constitutionality, but it had no jurisdiction to investigate the facts, to make findings thereon or to determine the weight of the evidence or credibility of the witnesses. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

The district court is not made a fact finder nor is it vested with any duty or power to administer the law. *State v. Ada County Dairymen's Ass'n*, 66 Idaho 317, 159 P.2d 219 (1945).

#### **Vested Right to Benefits.**

Under Unemployment Compensation Law, an employee who voluntarily quit her last employment had no "vested right" to benefits under her initial eligibility, by reason of having filed her claim prior to an enactment of an amendment disqualifying an employee who voluntarily quit last place of employment from benefits, and hence, denial of benefits to an employee did not give the amendment a prohibited retroactive effect. *Talley v. Unemployment Comp. Div.*, 63 Idaho 644, 124 P.2d 784 (1942).

### **RESEARCH REFERENCES**

**A.L.R.** — Construction of phrase "establishment" or "factory, establishment or other premises" within unemployment compensation statute rendering employee ineligible during labor dispute or strike at such location. 60 A.L.R.3d 11.

Construction of phrase "stoppage of work" in statutory provision denying unemployment compensation benefits during stoppage resulting from labor dispute. 61 A.L.R.3d 693.

Unemployment compensation: eligibility of participants in sympathy strike or slowdown. 61 A.L.R.3d 746.

What constitutes participation or direct interest in, or financing of, labor dispute or strike within disqualification provisions of unemployment compensation acts. 62 A.L.R.3d 314.

Refusal of nonstriking employee to cross picket line as justifying denial of unemployment compensation benefits. 62 A.L.R.3d 380.

Comment note — General principles pertaining to statutory disqualification for unemployment compensation benefits because of strike or labor dispute. 63 A.L.R.3d 88.

**72-1369. Overpayments, civil penalties and interest — Collection and waiver.** — (1) Any person who received benefits to which he was not entitled under the provisions of this chapter or under an unemployment insurance law of any state or of the federal government shall be liable to repay the benefits and the benefits shall, for the purpose of this chapter, be considered to be overpayments.



(2) Civil penalties. The director shall assess the following monetary penalties for each determination in which the claimant is found to have made a false statement, misrepresentation, or failed to report a material fact to the department:

(a) Twenty-five percent (25%) of any resulting overpayment for the first determination;

(b) Fifty percent (50%) of any resulting overpayment for the second determination; and

(c) One hundred percent (100%) of any resulting overpayment for the third and any subsequent determination.

(3) Any overpayment, civil penalty and/or interest which has not been repaid may, in addition to or alternatively to any other method of collection prescribed in this chapter, including the creation of a lien as provided by section 72-1360, Idaho Code, be collected with interest thereon at the rate prescribed in section 72-1360(2), Idaho Code. The director may also file a civil action in the name of the state of Idaho. In bringing such civil actions for the collection of overpayments, penalties and interest, the director shall have all the rights and remedies provided by the laws of this state, and any person adjudged liable in such civil action for any overpayments shall pay the costs of such action. A civil action filed pursuant to this subsection (3) shall be commenced within five (5) years from the date of the final determination establishing liability to repay. Any judgment obtained pursuant to this section shall, upon compliance with the requirements of chapter 19, title 45, Idaho Code, become a lien of the same type, duration and priority as if it were created pursuant to section 72-1360, Idaho Code.

(4) Collection of overpayments.

(a) Overpayments, other than those resulting from a false statement, misrepresentation, or failure to report a material fact by the claimant, which have not been repaid or collected, may, at the discretion of the director, be deducted from any future benefits payable to the claimant under the provisions of this chapter. Such overpayments not recovered within five (5) years from the date of the final determination establishing liability to repay may be deemed uncollectible.

(b) Overpayments resulting from a false statement, misrepresentation, or failure to report a material fact by the claimant which have not been recovered within eight (8) years from the date of the final determination establishing liability to repay may be deemed uncollectible.

(5) The director may waive the requirement to repay an overpayment, other than one resulting from a false statement, misrepresentation, or failure to report a material fact by the claimant, and interest thereon, if:

(a) The benefit payments were made solely as a result of department error or inadvertence and made to a claimant who could not reasonably have been expected to recognize the error; or

(b) Such payments were made solely as a result of an employer misreporting wages earned in a claimant's base period and made to a claimant who could not reasonably have been expected to recognize an error in the wages reported. The director, in his sole discretion, may also compromise a civil penalty assessed under subsection (2) of this section and/or interest.

(6) Neither the director nor any of his agents or employees shall be liable for benefits paid to persons not entitled to the same under the provisions of this chapter if it appears that such payments have been made in good faith and that ordinary care and diligence have been used in the determination of the validity of the claim or claims under which such benefits have been paid. [1947, ch. 269, § 69, p. 793; am. 1949, ch. 144, § 69, p. 252; am. 1973, ch. 89, § 3, p. 146; am. 1980, ch. 264, § 12, p. 682; am. 1983, ch. 146, § 8, p. 382; am. 1986, ch. 24, § 3, p. 71; am. 1990, ch. 353, § 4, p. 946; am. 1993, ch. 181, § 2, p. 461; am. 1997, ch. 205, § 8, p. 607; am. 1998, ch. 1, § 88, p. 3; am. 1999, ch. 101, § 3, p. 315; am. 2005, ch. 5, § 15, p. 6.]

#### STATUTORY NOTES

**Compiler's Notes.** — Section 10 of S.L. 1997, ch. 205 read: "Notwithstanding the effective dates specified in Section[s] 1 through 9 of this act, nothing in this act shall take effect unless the secretary of state shall certify to the Idaho Code Commission that he has received a sufficient appropriation to provide for the development of the technology required to implement the provisions of this act. If the certification is not made by the twenty-first day after adjournment sine die of the First Regular Session of the Fifty-fourth Idaho Legislature, this act shall be null and void."

The Secretary of State has so certified to the Idaho Code Commission and thus chapter 205 became effective as prescribed therein.

**Effective Dates.** — Section 5 of S.L. 1990, ch. 353 declared an emergency. Approved April 10, 1990.

Section 9 of S.L. 1997, ch. 205 read: "Sections 2 through 8 of this act shall be in full force and effect on and after July 1, 1998."

Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

#### JUDICIAL DECISIONS

##### **Repayment Not Required.**

Only the first two weeks of the claimant's severance plan was an award for the claimant's past service, and the remainder of the money paid to the claimant for 50 more weeks was paid to her as consideration for her agreement (1) not to sue her employer and (2) to release her employer from any claim that she might have against it relating to her employ-

ment or termination. Therefore, after the first two weeks, the payments from her employer were not reportable "severance pay" within the meaning of Idaho Admin. Code 09.01.30.525.11, and accordingly, the claimant was not required to repay the unemployment benefits she received. *Parker v. Underwriters Labs., Inc.*, 140 Idaho 517, 96 P.3d 618 (2004).

**72-1370. Distribution of benefit payments upon death.** — Whenever a benefit claimant dies, having completed a compensable period prior to his death, benefits due the deceased claimant at the time of death shall be payable, without administration, to the surviving spouse, if any, or, if there be no surviving spouse, to the dependent child or children. [1947, ch. 269, § 70, p. 793; am. 1949, ch. 144, § 70, p. 252; am. 1951, ch. 104, § 16, p. 233; am. 1998, ch. 1, § 89, p. 3.]

**72-1371. Misrepresentation to obtain benefits or to prevent payments or to evade contribution liability — Criminal penalty.** — (1) The making of a false statement when the maker knows the statement to be false, or the wilful [willful] failure to disclose a material fact in order to obtain or increase any benefit or other payment under this chapter or under an unemployment insurance law of any state or of the federal



government, either for the benefit of the maker or for any other person, is hereby declared to be a felony.

(2) The making by an employer or any officer or agent of an employer or any other person of a false statement or representation when the maker knows the statement or representation to be false, or the willful failure to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto or to avoid becoming or remaining a covered employer or to avoid or reduce any contribution or other payment required from a covered employer under this chapter or under any unemployment insurance law of any state or of the federal government, or the willful failure or refusal to make such contributions or other payment or to furnish any such reports required under this chapter is hereby declared to be a misdemeanor. [1947, ch. 269, § 71, p. 793; am. 1949, ch. 144, § 71, p. 252; am. 1951, ch. 235, § 5, p. 472; am. 1961, ch. 294, § 5, p. 517; am. 1963, ch. 316, § 6, p. 864; am. 1998, ch. 1, § 90, p. 3.]

### STATUTORY NOTES

**Compiler's Notes.** — The bracketed word near the beginning of subsection (1) was inserted by the compiler.

**Effective Dates.** — Section 8 of S.L. 1963, ch. 316 declared an emergency. Approved March 28, 1963.

### JUDICIAL DECISIONS

#### DECISIONS UNDER PRIOR LAW

##### ANALYSIS

Evidence supporting conviction.

Previous conviction a bar.

Venue.

#### **Evidence Supporting Conviction.**

In a trial for obtaining money under false pretenses, uncontradicted documentary evidence, consisting of a false written claim for unemployment compensation and "continued claim and payment order" signed by the defendant, and a state warrant drawn in his favor for the amount obtained and later cashed by him, together with one witness' testimony, was sufficient to support a conviction. *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941).

#### **Previous Conviction a Bar.**

A justice court complaint alleging that the defendant made and signed a claim for partial unemployment benefits under the Unemployment Compensation Law on a specified date at a named city, and defrauded the state of a specified sum by inducing the unemployment compensation division of the industrial accident board to pay such claim, sufficiently

charged the offense of obtaining money under false pretenses, so that a conviction thereunder could be pleaded as a bar to another charge of the same offense. *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941).

#### **Venue.**

In a trial for obtaining money under false pretenses, evidence that the defendant made a false claim for unemployment compensation at the Pocatello office of unemployment compensation division of the industrial accident board, that he stated on the face of such claim and his continued claim for benefits, also made at such office, that his and his employer's addresses were in such city, and that a warrant for payment of claim stated such address of the defendant, was sufficient to establish the commission of the offense in Bannock County, in the district court of which the defendant was tried, convicted, and sentenced. *State v. Barr*, 63 Idaho 59, 117 P.2d 282 (1941).

## RESEARCH REFERENCES

**A.L.R.** — Criminal liability for wrongfully obtaining unemployment benefits. 80 A.L.R.3d 1280.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments. 22 A.L.R.4th 534.

**72-1372. Civil penalties.** — (1) The following civil penalties shall be assessed by the director:

(a) If an employer willfully fails to file any report required by the director or files a false report, a penalty equal to one hundred percent (100%) of the amount that would be due if the employer had filed a correct report or two hundred fifty dollars (\$250), whichever is greater, shall be added to the liability of the employer for each quarter for which the employer failed to file a report or filed a false report. For the purposes of this section, a false report includes, but is not limited to, a report for a period wherein an employer pays remuneration for personal services which meets the definition of "wages" under section 72-1328, Idaho Code, and the payment is concealed, hidden, or otherwise not reported to the department.

(b) If an employer, or any officer or agent or employee of the employer with the employer's knowledge, willfully makes a false statement or representation or willfully fails to report a material fact when submitting facts to the department concerning a claimant's separation from the employer, a penalty in an amount equal to ten (10) times the weekly benefit amount of such claimant shall be added to the liability of the employer.

(c) If an employer induces, solicits, or coerces an employee or former employee to file a false or fraudulent claim for benefits under this chapter, a penalty in an amount equal to ten (10) times the weekly benefit amount of such employee or former employee shall be added to the liability of the employer.

(d) If an employer fails to complete and submit an Idaho business registration form, as required by section 72-1337(1), Idaho Code, a penalty of five hundred dollars (\$500) shall be assessed against the employer.

(e) For purposes of paragraphs (b) and (c) of this subsection (1), the term "weekly benefit amount" means the amount calculated pursuant to section 72-1367(2), Idaho Code.

(2) At the discretion of the director, the department may waive all or any part of the penalties imposed pursuant to this section if the employer shows to the satisfaction of the director that it had good cause for failing to comply with the requirements of this chapter and rules promulgated thereunder.

(3) Determinations imposing civil penalties pursuant to this section shall be served in accordance with section 72-1368(5), Idaho Code. Penalties imposed pursuant to this section shall be due and payable twenty (20) days after the date the determination was served unless an appeal is filed in accordance with section 72-1368, Idaho Code, and rules promulgated thereunder. Such appeals shall be conducted in accordance with section 72-1368, Idaho Code, and rules promulgated thereunder.

(4) Civil penalties imposed by this section shall be in addition to any other penalties authorized by this chapter. The provisions of this chapter



that apply to the collection of contributions, and the rules promulgated thereunder, shall also apply to the collection of penalties imposed pursuant to this section. Amounts collected pursuant to this section shall be paid into the state employment security administrative and reimbursement fund as established by section 72-1348, Idaho Code. [I.C., § 72-1372, as added by 2005, ch. 5, § 16, p. 6.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-1372, which comprised S.L. 1947, ch. 269, § 72, p. 793; 1949, ch. 144, § 72, p. 252, was repealed by S.L. 1963, ch. 316, § 7.

**Effective Dates.** — Section 18 of S.L. 2005, ch. 5 provided that the act should take effect on and after July 1, 2005.

**72-1373. Violation of this law or rules thereunder.** — Any person who shall willfully violate any provision of this chapter or any order or rule thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which a penalty is neither prescribed in this chapter, nor provided by any other applicable statute, shall be guilty of a misdemeanor, and each day such violation continues shall be deemed to be a separate misdemeanor. [1947, ch. 269, § 73, p. 793; am. 1949, ch. 144, § 73, p. 252; am. 1998, ch. 1, § 91, p. 3.]

**72-1374. Unauthorized disclosure of information.** — If any employee or member of the commission or any employee of the department, in violation of the provisions of chapter 3, title 9, Idaho Code, makes any disclosure of information obtained from any employer or individual in the administration of this chapter, each unauthorized disclosure shall constitute a separate misdemeanor. [1947, ch. 269, § 74, p. 793; am. 1949, ch. 144, § 74, p. 252; am. 1990, ch. 213, § 110, p. 480; am. 1998, ch. 1, § 92, p. 3.]

#### STATUTORY NOTES

**Cross References.** — Disclosure of information, § 72-1342.

**Compiler's Notes.** — The word "commission" was substituted for the word "board" on the authority of S.L. 1971, ch. 124, § 3, p. 422, compiled herein as § 72-502, which provided that the reference to the "industrial accident board" and "board" were deemed to be refer-

ences to the "industrial commission."

**Effective Dates.** — Section 111 of S.L. 1990, ch. 213 as amended by § 16 of S.L. 1991, ch. 329 provided that §§ 3 through 45 and 48 through 110 of the act should take effect July 1, 1993 and that §§ 1, 2, 46 and 47 should take effect July 1, 1990.

**72-1375. Protection of rights and benefits.** — (1) Any agreement to waive, release, or commute any right to benefits or other rights under this chapter shall be void. Any agreement by any individual performing services for a covered employer to pay all or any portion of any contributions or penalties required under this chapter from such employer, shall be void. No covered employer shall directly or indirectly make or require or accept any deduction from wages to finance the contributions required from him, require or accept any waiver of any right under this chapter by any individual rendering service for him, discriminate in regard to the hiring or tenure of work or any term or condition of work of any individual on account

of his claiming benefits under this chapter, or in any manner obstruct or impede the claiming of benefits. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be guilty of a misdemeanor.

(2) No individual claiming benefits shall be charged fees or costs of any kind in any proceeding under this chapter by the commission, the director, any of its or his employees or representatives, or by any court or any officer thereof, except that a court may assess costs if the court determines that the proceedings have been instituted or continued without reasonable ground. Any individual claiming benefits in any proceeding before the department, the commission, or a court may be represented by counsel or other duly authorized agent. Any person who violates any provision of this subsection shall, for each such offense, be guilty of a misdemeanor.

(3) Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or an order for the payment of attorney's fees. Benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of debts. Any waiver of any exemption provided for in this subsection shall be void.

(4) The provisions of this section shall not apply to any action taken pursuant to section 72-1365(2), Idaho Code. [1947, ch. 269, § 75, p. 793; am. 1949, ch. 144, § 75, p. 252; am. 1951, ch. 235, § 6, p. 472; am. 1982, ch. 326, § 12, p. 807; am. 1998, ch. 1, § 93, p. 3.]

## STATUTORY NOTES

**Effective Dates.** — Section 13 of S.L. 1982, ch. 326 provided that the act should take effect on September 26, 1982.

## JUDICIAL DECISIONS

### ANALYSIS

Attorney fees.  
Earned increment.

#### Attorney Fees.

The court does not award attorney fees in appeals by claimants from decisions of the Industrial Commission, unless the court determines that the proceedings have been instituted or continued without reasonable ground. *Rivas v. K.C. Logging*, 134 Idaho 603, 7 P.3d 212 (2000).

#### Earned Increment.

Claimant, a carpenter, upon termination of his employment by reason of the completion of the project, filed claim for unemployment benefits and was thereafter paid benefits. Exclud-

ing a short employment interval and vacation period, the unemployed carpenter commenced constructing a dwelling on two lots he owned, doing this in his spare time while unemployed and such was held to be an increment of his estate equal to, if not greater than, the wages he would have been required to pay other artisans to work for him and he was held fully employed and receiving actual wages, and therefore not entitled to pension benefits, but since he had received them in good faith was not required to repay benefits received. *Hatch v. Employment Sec. Agency*, 79 Idaho 246, 313 P.2d 1067 (1957).



## DECISIONS UNDER PRIOR LAW

**Constitutionality.**

The provision of Unemployment Compensation Law requiring that person appealing submit to jurisdiction of industrial accident board was unconstitutional since it violated due process clause by taking away right to appeal to a court. *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P.2d 156 (1944).

**Cited in:** *Norman v. Employment Sec.*

*Agency*, 83 Idaho 1, 356 P.2d 913 (1960); *Custom Meat Packing Co. v. Martin*, 85 Idaho 374, 379 P.2d 664 (1963); *Burroughs v. Employment Sec. Agency*, 86 Idaho 412, 387 P.2d 473 (1963); *Conrad v. Altmiller*, 89 Idaho 214, 404 P.2d 337 (1965); *Idaho Power Co. v. Idaho Pub. Utils. Comm'n*, 102 Idaho 744, 639 P.2d 442 (1981).

**72-1376. Representation in court.** — (1) In any civil action to enforce the provisions of this chapter the director, the commission, and the state shall be represented by the attorney general, or if the action is brought in the courts of any other state, by any attorneys qualified to appear in the courts of that state.

(2) All criminal actions for violation of any provision of this chapter, or of any rules issued pursuant thereto, shall be prosecuted by the attorney general of the state, or, at his request and under his direction, by the prosecuting attorney of any county wherein the defendant resides or has a place of business. [1947, ch. 269, § 76, p. 793; am. 1949, ch. 144, § 76, p. 252; am. 1998, ch. 1, § 94, p. 3.]

## STATUTORY NOTES

**Compiler's Notes.** — The word "commission" was substituted for "board" on the authority of S.L. 1971, ch. 124, § 3, p. 422, compiled as § 72-502, which provided that

the reference to the "industrial accident board" and "board" were deemed to be references to the "industrial commission."

**72-1377. Saving clause.** — The legislature reserves the right to amend or repeal all or any part of this chapter at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this chapter or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal this chapter at any time. [1947, ch. 269, § 77, p. 793; am. 1949, ch. 144, § 77, p. 252; am. 1998, ch. 1, § 95, p. 3.]

## JUDICIAL DECISIONS

**Controlling Law.**

In view of the saving clause of the Employment Security Law, an order entered on June

26, 1947 came under the old Unemployment Compensation Law. *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947).

**72-1378. Separability of provisions.** — If any provision of this chapter, or the application thereof to any person or circumstance, shall be declared by the courts to be unconstitutional, inoperative or void, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby. [1947, ch. 269, § 78, p. 793; am. 1949, ch. 144, § 78, p. 252; am. 1998, ch. 1, § 96, p. 3.]

**72-1379. References in chapter.** — A reference in this chapter to any state or federal law means the law as it existed on the effective date of this chapter and any amendments or recodifications thereto. [1947, ch. 269, § 79, p. 793; am. 1949, ch. 144, § 79, p. 252; am. 1951, ch. 104, § 17, p. 233; am. 1998, ch. 1, § 97, p. 3.]

#### STATUTORY NOTES

**Effective Dates.** — Section 18 of S.L. 1951, ch. 104 declared an emergency. Approved March 10, 1951.

**72-1380. Federal reimbursement for benefits paid to newly covered workers during transition period. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 72-1380, as added by 1977, ch. 179, § 18, p. 464, was repealed by S.L. 1998, ch. 1, § 98, effective July 1, 1998.

**72-1381. Director to cooperate with governor in mediation of disputes.** — Upon the request of any interested party to an actual or potential labor dispute, the director shall have the power to mediate the dispute. The director or any interested party may apply to the governor for appointment of a mediator or a mediation panel of not less than three (3) citizens who are objective in matters involving labor disputes, and the governor shall, if the public interest will be served thereby, appoint such a mediator or mediation panel. Such mediator or mediation panel shall be paid actual expenses by the interested parties while engaged in such public business. Neither the director, the governor, nor any mediator or member of any mediation panel shall be authorized to arbitrate any labor dispute. [1949, ch. 254, § 6, p. 511; am. 1974, ch. 39, § 7, p. 1023; am. and redesign. 1996, ch. 421, § 10, p. 1406; am. 1998, ch. 1, § 99, p. 3.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 44-106 and was amended and redesignated as this section by § 10 of S.L. 1996, ch. 421.

**72-1382. Duties of director — Determination of representatives.** — The director shall, when a question arises concerning the representation of employees in a collective bargaining unit, investigate such controversy and certify to the parties the name or names of the representatives who have been selected. In any such investigation the director shall provide for an appropriate hearing, and may take a secret ballot of employees to ascertain such representatives. In all cases where a secret ballot is taken, the ballot shall permit a vote against representation by anyone named on the ballot; provided, however, that nothing in this section shall be construed as authorizing the director to conduct an election on any matter which is within the exclusive jurisdiction of any federal official or board; and provided further that no election shall be directed in any bargaining unit or



subdivision within which, in the preceding twelve (12) month period, a valid election was held. [1949, ch. 254, § 7, p. 511; am. 1963, ch. 110, § 1, p. 332; am. 1974, ch. 39, § 8, p. 1023; am. and redesisg. 1996, ch. 421, § 11, p. 1406; am. 1998, ch. 1, § 100, p. 3.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was amended and redesignated as this section by formerly compiled as § 44-107 and was § 11 of S.L. 1996, ch. 421.

### JUDICIAL DECISIONS

#### ANALYSIS

Elections.

Public employment.

#### Elections.

The mandatory requirements of this section providing for election rendered the rule by which the commissioner [director] attempted to defeat the holding of an election until after the year had elapsed subsequent to the holding of an initial election, not authorized, beyond his authority and void when a question arose concerning representation of employees in a collective bargaining unit. *Pumice Prods., Inc. v. Robison*, 79 Idaho 144, 312 P.2d 1026 (1957).

The holding of the election as requested and demanded is conformable to the declaration of policy of the labor act as set forth in § 44-701, where employees sought to revoke the authority of a union, after having voted to have a

union represent them as a bargaining agent, but no working agreement was ever reached. *Pumice Prods., Inc. v. Robison*, 79 Idaho 144, 312 P.2d 1026 (1957).

#### Public Employment.

There is no legislative intent by this act to inaugurate a mandatory system of collective bargaining in government employment and the duties of the commissioner of labor under this section do not extend to questions of representation in public employment of employees in a collective bargaining unit. *Local Union 283, International Brotherhood of Elec. Workers v. Robison*, 91 Idaho 445, 423 P.2d 999 (1967).

### RESEARCH REFERENCES

**Am. Jur.** — 48 Am. Jur. 2d, Labor, §§ 546, 547, 864 et seq.

**72-1383. Employers and bargaining agent are required to negotiate. [Repealed.]**

### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 44-107A, as added by 1963, ch. 110, § 2, p. 332; am. 1974, ch. 39, § 9, p. 1023; am. and redesisg. 1996, ch. 421, § 12, p. 1406, was repealed by S.L. 1998, ch. 1, § 101, effective July 1, 1998.

**72-1384. Penalties for violations. [Repealed.]**

### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised I.C., § 44-107B, as added by 1963, ch. 110, § 3, p. 332; am. and redesisg. 1996, ch. 421, § 13, p. 1406, was repealed by S.L. 1998, ch. 1, § 101, effective July 1, 1998.

**72-1385. Provisions not to apply to agricultural or domestic labor.** — The provisions of sections 72-1381 and 72-1382, Idaho Code, shall not apply to labor engaged in agricultural labor as that term is defined in section 72-1304, Idaho Code, nor to anyone engaged in domestic service in homes. [1949, ch. 254, § 8, p. 511; am. and redesisg. 1996, ch. 421, § 14, p. 1406; am. 1998, ch. 1, § 102, p. 3.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 44-108 and was amended and redesignated as this section by § 14 of S.L. 1996, ch. 421.

**Effective Dates.** — Section 11 of S.L. 1949, ch. 254 declared an emergency. Approved March 16, 1949.

## PART III

### CHAPTER 14

#### FIREMEN'S RETIREMENT FUND

##### SECTION.

- 72-1401. Purpose of chapter.
- 72-1402. Construction.
- 72-1403. Definitions.
- 72-1404. Average final compensation.
- 72-1405. Powers and duties of public employee retirement board.
- 72-1406. Administration of provisions of chapter.
- 72-1407. Power of board to sue and be sued.
- 72-1408. Power of board to engage employees.
- 72-1409. Employment of attorneys and agents.
- 72-1410. Risks authorized to be insured — Payment of premiums.
- 72-1411. Liability of board.
- 72-1412 — 72-1415. [Amended and Redesignated.]
- 72-1416. [Repealed.]
- 72-1417, 72-1418. [Amended and Redesignated.]
- 72-1419. [Repealed.]
- 72-1420. [Amended and Redesignated.]
- 72-1421. Funds — How used.
- 72-1422. Benefits exempt from execution — Not assignable.
- 72-1423. Filing of claims — Procedure — Jurisdiction of industrial commission.
- 72-1424. Presentation of false claim penalized.
- 72-1425. Workers' compensation law not repealed.
- 72-1426. Records to be public records.
- 72-1427. [Amended and Redesignated.]
- 72-1428. [Amended and Redesignated.]
- 72-1429. [Reserved.]
- 72-1429A — 72-1429D. [Repealed.]
- 72-1429E. Surviving child.

##### SECTION.

- 72-1429F. [Amended and Redesignated.]
- 72-1429G. [Repealed.]
- 72-1429H — 72-1429J. [Amended and Redesignated.]
- 72-1429K. [Repealed.]
- 72-1429L, 72-1429M. [Amended and Redesignated.]
- 72-1429N — 72-1429P. [Repealed.]
- 72-1429Q — 72-1429S. [Amended and Redesignated.]
- 72-1430. [Amended and Redesignated.]
- 72-1430A — 72-1430G. [Repealed.]
- 72-1430H. [Amended and Redesignated.]
- 72-1431. Contribution from firefighters — Manner of collection.
- 72-1432. Pension fund contributions by cities and fire districts — Remittances.
- 72-1432A — 72-1432C. [Amended and Redesignated.]
- 72-1433. Failure of city or fire district to make payment — Effect.
- 72-1433A — 72-1433E. [Repealed.]
- 72-1434. Optional pension amounts — Option I and Option II.
- 72-1435. Voluntary retirement — Years of service determine pension benefit.
- 72-1436 — 72-1440. [Reserved.]
- 72-1441. Date of payment.
- 72-1442. Pension payment — Maximum.
- 72-1443. Accrued pension payment — Firefighters discontinuing service prior to voluntary retirement.
- 72-1444. Refund to firefighter terminating employment — Repayment on reemployment — Conversion



## SECTION.

- of contributions — Purchase of service credits.
- 72-1445. Pension payment — Retirement of firefighter incapacitated in the performance of duty.
- 72-1446. Pension payment — Retirement of incapacitated firefighters for nonservice.
- 72-1447. Payment of pensions — Amount to be paid — Parties entitled thereto.
- 72-1448 — 72-1450. [Reserved.]
- 72-1451. Disability — Reexamination — Return to service.
- 72-1452. Review of disability.
- 72-1453 — 72-1460. [Reserved.]
- 72-1461. Death benefits — Spouse and the surviving child or children of firefighter killed in performance of duty.

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- 72-1462. Death benefits — Spouse of retired firefighter.
- 72-1463. Death benefits — Surviving spouse and surviving child or children of retired firefighter.
- 72-1464. Death benefits — Surviving spouse and children of firefighter dying from causes unconnected with duties but during service after five years.
- 72-1465. Death benefits — Spouse and children of firefighter dying from causes unconnected with duties but during service after twenty-five years.
- 72-1466 — 72-1470. [Reserved.]
- 72-1471. Cost of living adjustment.
- 72-1472. Separability.

**72-1401. Purpose of chapter.** — The retirement, with continuance of pay for themselves, provision for dependents, and pay during temporary disability, and the encouragement of long service in fire fighting service, of paid firefighters becoming aged or disabled in the service of the state or any of its cities or fire districts, is hereby declared to be a public purpose of joint concern to the state and each of its cities and fire districts in the protection and conservation of property and lives and essential to the maintenance of competent and efficient personnel in fire service.

The provisions of chapter 14, title 72, Idaho Code, are applicable only to those paid firefighters who were employed as paid firefighters prior to October 1, 1980. If any person employed as a paid firefighter prior to October 1, 1980, should leave such employment prior to his establishing eligibility to benefits under any provision of chapter 14, title 72, Idaho Code, except as provided by sections 44-109(6), 72-1445, and 72-1444, Idaho Code, and such firefighter is again employed as a paid firefighter, he shall not be eligible to participate in the retirement system authorized by chapter 14, title 72, Idaho Code, but shall be eligible to participate in the public employee retirement system, as provided in chapter 13, title 59, Idaho Code. [1945, ch. 76, § 1, p. 112; am. 1980, ch. 50, § 2, p. 79; am. 1990, ch. 231, § 70, p. 611.]

## STATUTORY NOTES

**Cross References.** — Policeman's Retirement Fund, §§ 50-1501 — 50-1525.

**Compiler's Notes.** — Section 44-109, referred to in the second paragraph of this section, was amended and redesignated as § 44-1812, by S.L. 1996, ch. 421, § 15.

This law ordinarily would have been placed in title 50, Municipal Corporations, in the same relative position as the Policeman's Retirement Fund, which is chapter 15, in the Municipal Corporations title.

However, the firemen's retirement fund is

administered and claims are paid in ways entirely different from the policeman's retirement fund.

Since the amendment of various sections of this chapter the firemen's retirement fund is administered by the public employee retirement system board and all claims against the fund are filed with and passed upon by the industrial commission. Consequently, this law has been placed in this title along with other laws under the jurisdiction of said commission.

**JUDICIAL DECISIONS**

**Cited in:** Branson v. Firemen's Retirement Fund, 79 Idaho 167, 312 P.2d 1037; McNichols v. Public Employee Retirement Sys., 114 Idaho 247, 755 P.2d 1285 (1988); Deonier v. State, Pub. Employee Retirement Bd., 114 Idaho 721, 760 P.2d 1137 (1988).

**72-1402. Construction.** — The provisions of this chapter shall be liberally construed, with the object of promotion of justice and the welfare of the persons subject to its provisions. [1945, ch. 76, § 20, p. 112; am. 1980, ch. 50, § 17, p. 79; am. and redesi. 1990, ch. 231, § 71, p. 611.]

**STATUTORY NOTES**

**Compiler's Notes.** — This section was formerly compiled as § 72-1420. Former § 72-1402 was amended and redesignated as § 72-1403 by § 72 of S.L. 1990, ch. 231.

**JUDICIAL DECISIONS**

**Cited in:** Deonier v. State, Pub. Employee Retirement Bd., 114 Idaho 721, 760 P.2d 1137 (1988).

**72-1403. Definitions.** — The following are definitions of terms used in this chapter:

(A) The words "paid fireman" are synonymous with "paid firefighter," and mean any individual, male or female, excluding office secretaries employed after July 1, 1967, who is on the payroll of any city or fire district in the state of Idaho prior to October 1, 1980, and who devotes his or her principal time of employment to the care, operation, maintenance or the requirements of a regularly constituted fire department of such city or fire district in the state of Idaho.

(B) "Industrial commission" means the commission as authorized and created under the provisions of chapter 5, title 72, Idaho Code.

(C) "Workers' compensation law" means the workers' compensation law as authorized and created under title 72, Idaho Code.

(D) "Twenty-five (25) years active service": an individual whose principal means of livelihood for the period of twenty-five (25) years has been through employment by a city or fire district in the state of Idaho in a regularly constituted fire department of a city or fire district, and has actually been carried on the payroll of an Idaho fire department for twenty-five (25) years or more.

(E) "Five (5) years continuous service": an individual who has been employed by a regularly constituted fire department in a city or fire district in the state of Idaho for a period of five (5) years continuously, without having engaged in any other gainful occupation as his principal gainful occupation and has had "five (5) years continuous service" with a paid fire department of a city or fire district in the state of Idaho.

(F) "Public employee retirement account" as used herein, means the public employee retirement account created by chapter 13, title 59, Idaho



Code, and the "director" thereof, as used herein, means the executive director or manager of the public employee retirement system.

(G) The meaning of the term "incapacitated in a degree which prohibits efficient service" means that degree of mental or physical disability which prohibits the efficient performance of the duties of a paid firefighter.

(H) "Years active service": service rendered by an individual whose principal means of livelihood for the prescribed period of years has been through employment by a city or fire district in the state of Idaho, in a regularly constituted fire department of a city or fire district, and has actually been carried on the payroll of an Idaho fire department for the prescribed period of years. All years of active service as herein defined before the establishment of the firefighters' retirement fund may count only toward the prescribed period of years for retirement as set out in sections 72-1446, 72-1464, 72-1465 and 72-1435, Idaho Code. Before any year's service since February 28, 1945, may count toward the prescribed period of years, contributions must have been deducted from his or her wage or salary and remitted as set out in sections 72-1431 and 72-1432, Idaho Code, for that year.

(I) "Accumulated contributions" mean the sum of all amounts contributed by a firefighter to the retirement fund, pursuant to the provisions of chapter 14, title 72, Idaho Code, together with regular interest credited thereon.

(J) "Regular interest" means interest at the rate set from time to time by the board pursuant to section 59-1302(26), Idaho Code. [1945, ch. 76, § 2, p. 112; am. 1963, ch. 125, § 1, p. 358; am. 1967, ch. 17, § 1, p. 33; am. 1976, ch. 273, § 1, p. 921; am. 1978, ch. 331, § 1, p. 851; am. 1980, ch. 50, § 3, p. 79; am. and redesign. 1990, ch. 231, § 72, p. 611; am. 1991, ch. 26, § 1, p. 49; am. 1993, ch. 350, § 9, p. 1295.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-1403, which comprised S.L. 1945, ch. 76, § 3, p. 112; am. 1976, ch. 273, § 2, p. 921; am. 1978, ch. 331, § 2, p. 851 creating the firemen's retirement

fund was repealed by S.L. 1979, ch. 147, § 11, effective October 1, 1980.

**Compiler's Notes.** — This section was formerly compiled as § 72-1402.

**72-1404. Average final compensation.** — "Average final compensation" shall mean the average of the highest annual compensation received by the individual paid firefighter in this state, as defined in subsection (A) of section 72-1403, Idaho Code, during a period of five (5) consecutive years of service, as defined in subsection (H) of section 72-1403, Idaho Code, immediately preceding his or her retirement or leaving service. If said firefighter has less than five (5) years of service, then "average final compensation" shall mean the annual average compensation received by him or her during the total years of service. [I.C., § 72-1432A, as added by 1976, ch. 273, § 22, p. 921; am. and redesign. 1990, ch. 231, § 73, p. 611.]

## STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1432A. Ignated as § 72-1421 by § 81 of S.L. 1990, ch. 231.  
Former § 72-1404 was amended and redese-

**72-1405. Powers and duties of public employee retirement board.**

— The public employee retirement system board shall have power to make rules and regulations for the administration of this chapter, to prescribe forms and require registration, to delegate its authority to act in specific instances to its deputies and employees, and to incur expenses in connection with the management, administration and enforcement of this chapter, which expenses shall be paid out of the public employee retirement account. [1945, ch. 76, § 15, p. 112; am. 1980, ch. 50, § 14, p. 79; am. and redesign. 1990, ch. 231, § 74, p. 611.]

## STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1415. Ignated as § 72-1406 by § 75 of S.L. 1990, ch. 231.  
Former § 72-1405 was amended and redese-

**72-1406. Administration of provisions of chapter.** — The provisions of this chapter shall be administered by the public employee retirement system board without liability on the part of the state, or of any of its officers, beyond the moneys in the public employee retirement account for the purposes of chapter 14, title 72, Idaho Code, and the moneys accruing thereto. It shall be the duty of the board to administer the account and conduct the business thereof, and the board is hereby vested with full authority over the account, and may do any and all things which are necessary or convenient in the administration thereof as provided or as consistent with the provisions of this chapter and the general laws of the state. [1945, ch. 76, § 5, p. 112; am. 1980, ch. 50, § 5, p. 79; am. and redesign. 1990, ch. 231, § 75, p. 611.]

## STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1405. Ignated as § 72-1407 by § 76 of S.L. 1990, ch. 231.  
Former § 72-1406 was amended and redese-

## JUDICIAL DECISIONS

**Cited in:** *Lynn v. Kootenai County Fire Protective Dist. #1*, 97 Idaho 623, 550 P.2d 126 (1976).

**72-1407. Power of board to sue and be sued.** — The public employee retirement system board shall, in its official name, have power to sue and be sued in all matters arising out of the administration, management and enforcement of this chapter. The venue of all actions in which the board is a party shall be Ada County, Idaho. [1945, ch. 76, § 6, p. 112; am. 1980, ch. 50, § 6, p. 79; am. and redesign. 1990, ch. 231, § 76, p. 611.]



## STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1406. Ignated as § 72-1408 by § 77 of S.L. 1990, ch. 231.  
Former § 72-1407 was amended and reded-

**72-1408. Power of board to engage employees.** — The public employee retirement system board shall have power to engage all needful assistants, experts, accountants, clerks, and other employees which may be found necessary by it, in carrying out the provisions of this chapter, the same to be paid out of the public employee retirement account. [1945, ch. 76, § 7, p. 112; am. 1980, ch. 50, § 7, p. 79; am. and rededig. 1990, ch. 231, § 77, p. 611.]

## STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1407. Ignated as § 72-1411 by § 80 of S.L. 1990, ch. 231.  
Former § 72-1408 was amended and reded-

**72-1409. Employment of attorneys and agents.** — The public employee retirement system board and its director are hereby given power and authority to employ attorneys and agents in the administration of this chapter, its conservation and protection. [1945, ch. 76, § 25, p. 112; am. 1980, ch. 50, § 20, p. 79; am. and rededig. 1990, ch. 231, § 78, p. 611.]

## STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1409 which comprised S.L. 1945, ch. 76, § 9, p. 112, was repealed by S.L. 1980, ch. 50, § 1. This section was formerly compiled as § 72-1424.

**72-1410. Risks authorized to be insured — Payment of premiums.** — In event the public employee retirement system board shall determine that there are risks arising under the terms of this chapter which may be made the subject of insurance against loss to the public employee retirement account, the board is hereby authorized, at its discretion, to insure such risks; in event of such insurance, the premiums therefor shall be paid from the public employee retirement account as other claims are paid: provided, that such insurance shall not in any event be insurance of any individual but exclusively insurance of the public employee retirement account itself against loss. [1945, ch. 76, § 22, p. 112; am. 1980, ch. 50, § 18, p. 79; am. and rededig. 1990, ch. 231, § 79, p. 611.]

## STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1422. Ignated as § 72-1425 by § 84 of S.L. 1990, ch. 231.  
Former § 72-1410 was amended and reded-

**72-1411. Liability of board.** — The public employee retirement system board shall not, nor shall any person employed by it, be personally liable in

its private capacity for or on account of any act performed or entered into in an official capacity in good faith and without intent to defraud, in connection with the administration of the provisions of chapter 14, title 72, Idaho Code. [1945, ch. 76, § 8, p. 112; am. 1980, ch. 50, § 8, p. 79; am. and redesign. 1990, ch. 231, § 80, p. 611.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was designated as § 72-1431 by § 86 of S.L. 1990, ch. 231. formerly compiled as § 72-1408.

Former § 72-1411 was amended and redesignated as § 72-1432 by § 87 of S.L. 1990, ch. 231.

#### 72-1412. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1412 was amended and redesignated as § 72-1432 by § 87 of S.L. 1990, ch. 231.

#### 72-1413. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1413 was amended and redesignated as § 72-1433 by § 88 of S.L. 1990, ch. 231.

#### 72-1414. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1414 was amended and redesignated as § 72-1447 by § 97 of S.L. 1990, ch. 231.

#### 72-1415. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1415 was amended and redesignated as § 72-1405 by § 74 of S.L. 1990, ch. 231.

#### 72-1416. Investment of surplus, [Repealed.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which comprised S.L. 1945, ch. 76, § 16, p. 112; am. 1961, ch. 265, § 1, p. 470; am. 1967, ch. 17, § 2, p. 33; am. 1978, ch. 338, § 1, p. 871, was repealed by S.L. 1979, ch. 147, § 11.



**72-1417. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1417 was amended and redesignated as § 72-1422 by § 82 of S.L. 1990, ch. 231.

**72-1418. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1418 was amended and redesignated as § 72-1426 by § 85 of S.L. 1990, ch. 231.

**72-1419. Monthly estimate of necessary funds — Approval of amount — Monthly accounting. [Repealed.]****STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised S.L. 1945, ch. 76, § 19, p. 112, was repealed by S.L. 1980, ch. 50, § 1.

**72-1420. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1420 was amended and redesignated as § 72-1402 by § 71 of S.L. 1990, ch. 231.

**72-1421. Funds — How used.** — All moneys coming into the public employee retirement account under the provisions of this chapter are hereby continuously appropriated for the objects and purposes of this chapter and the uses and purposes set forth in this chapter, and to pay all costs and expenses to be incurred and the costs of administration thereof by the public employee retirement system as herein provided. [1945, ch. 76, § 4, p. 112; am. 1980, ch. 50, § 4, p. 79; am. and redessig. 1990, ch. 231, § 81, p. 611.]

**STATUTORY NOTES**

**Prior Laws.** — Former § 72-1421 which comprised S.L. 1945, ch. 76, § 21, p. 112, was repealed by S.L. 1980, ch. 50, § 1.

**Compiler's Notes.** — This section was formerly compiled as § 72-1404.

**72-1422. Benefits exempt from execution — Not assignable.** — No benefits or payments payable under the provisions of this chapter shall be subject to execution, nor assignable, nor shall the same be hypothecated or in any manner encumbered, except as ordered by a court to be transferred to an alternate payee in an approved domestic retirement order, as provided in sections 59-1319 and 59-1320, Idaho Code. [1945, ch. 76, § 17, p. 112; am.

1980, ch. 50, § 15, p. 79; am. and redesisg. 1990, ch. 231, § 82, p. 611; am. 2006, ch. 19, § 2, p. 71.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 19, added “except as ordered by a court to be transferred to an alternate payee in an approved domestic retirement order, as provided in sections 59-1319 and 59-1320, Idaho Code” to the end of the section.

**Compiler's Notes.** — This section was formerly compiled as § 72-1417.

Former § 72-1422 was amended and redesignated as § 72-1410 by § 79 of S.L. 1990, ch. 231.

**72-1423. Filing of claims — Procedure — Jurisdiction of industrial commission.** — All claims against the public employee retirement account shall be filed with the public employee retirement system board. Any appeal from a decision of the board shall be filed with the industrial commission in as nearly as practicable the same manner that claims under the Workers' Compensation Law of the state of Idaho are filed, and the said industrial commission is hereby given jurisdiction to entertain and pass upon said claims, allow or deny claims and make awards, and the provisions of the Workers' Compensation Law of the state of Idaho relative to process, hearings and appeals are hereby made applicable to the provisions of this chapter, and said industrial commission is hereby given power and authority to make rules and regulations governing procedure in relation to said claims appealed from the public employee retirement system board. [1945, ch. 76, § 24, p. 112; am. 1980, ch. 50, § 19, p. 79; am. 1993, ch. 350, § 10, p. 1295.]

### JUDICIAL DECISIONS

#### ANALYSIS

In general.  
Statute of limitations.

#### In General.

This section relates only to procedure, i.e., the filing, hearing and determination of claims against the firemen's retirement fund with the provision of the Workmen's Compensation Law relative to process, hearings and appeals made applicable. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957).

#### Statute of Limitations.

The doctrine of *res judicata* has no application to appellant's claim for death benefits under the firemen's retirement fund and in regard to respondent's plea of the statute of limitations, contained in the Workmen's Compensation Law, the industrial accident board has ruled by virtue of the provisions of this section relating to claims, process, hearing

and appeals, are by reference a part of the firemen's retirement act. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957).

While provisions relating to statute of limitations contained in Workmen's Compensation Law were by reference in this section to claims, made a part of the firemen's retirement act the board did not rule that either section of such statutes would bar widow's claim that should not come into existence until death of employee and she has perfected her pending appeal within the time limit specified. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957).

**Cited in:** *Deonier v. State, Pub. Employee Retirement Bd.*, 114 Idaho 721, 760 P.2d 1137 (1988).

**72-1424. Presentation of false claim penalized.** — Any person making a false claim for allowance of benefits or payment of money under



this chapter, knowing the same to be false, shall be guilty of a misdemeanor and shall be punished as provided by law. [1945, ch. 76, § 28, p. 112; am. 1980, ch. 50, § 22, p. 79; am. and redesign. 1990, ch. 231, § 83, p. 611.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1427.

Former § 72-1424 was amended and redesignated as § 72-1409 by § 78 of S.L. 1990, ch. 231.

**Effective Dates.** — Section 29 of S.L. 1945, ch. 76 declared an emergency. Approved Feb. 28, 1945.

**72-1425. Workers' compensation law not repealed.** — No provision contained in this chapter shall be deemed to operate as either a repeal or modification of any provision of the Workers' Compensation Law of this state, except as hereinafter specifically set forth. [1945, ch. 76, § 10, p. 112; am. 1980, ch. 50, § 9, p. 79; am. and redesign. 1990, ch. 231, § 84, p. 611; am. 1993, ch. 350, § 11, p. 1295.]

#### STATUTORY NOTES

**Prior Laws.** — Former § 72-1425 which comprised 1945, ch. 26, § 26, p. 112, was repealed by S.L. 1976, ch. 273, § 25.

**Compiler's Notes.** — This section was formerly compiled as § 72-1410.

**72-1426. Records to be public records.** — The records of the industrial commission, insofar as they relate to the administration, management, and enforcement of this chapter, shall constitute public records. [1945, ch. 76, § 18, p. 112; am. 1980, ch. 50, § 16, p. 79; am. and redesign. 1990, ch. 231, § 85, p. 611.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1418.

Former § 72-1426 was amended and redesignated as § 72-1472 by § 106 of S.L. 1990, ch. 231.

Former § 72-1426 was amended and redesignated as § 72-1472 by § 106 of S.L. 1990, ch. 231.

#### 72-1427. [Amended and Redesignated.]

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1427 was amended and redesignated as § 72-1424 by § 83 of S.L. 1990, ch. 231.

#### 72-1428. [Amended and Redesignated.]

#### STATUTORY NOTES

**Prior Laws.** — A former section 72-1428 which comprised 1945, ch. 76, § 30, as added by 1947, ch. 159, § 2, p. 409; am. 1957, ch. 185, § 4, p. 363 was repealed by section 1 of S.L. 1974, ch. 59.

**Compiler's Notes.** — This section, which comprised I.C., § 72-1428, as added by 1974, ch. 59, § 2, p. 1136; am. 1976, ch. 316, § 1, p. 1084; am. 1977, ch. 97, § 1, p. 202; am. 1980, ch. 50, § 23, p. 79; am. 1983, ch. 90, § 1, p.

187; am. 1984, ch. 242, § 1, p. 588, is now compiled as § 44-109.

**72-1429. [Reserved.]**

**72-1429A — 72-1429D. Pension payment — Voluntary retirement after twenty, twenty-five — Thirty or thirty-five years. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — These sections 358, were repealed by S. L. 1976, ch. 273, which comprised I.C. §§ 72-1429A — 72- § 25.  
1429D, as added by 1963, ch. 125, §§ 4-7, p.

**72-1429E. Surviving child.** — A person qualifies as a surviving child of a firefighter if he or she is dependent on the firefighter at the time of the firefighter's death and meets either of the following requirements:

(a) At the time of the firefighter's death, the person is under the age of eighteen (18) years and, had the firefighter been eligible for social security benefits, would be entitled to child insurance benefits under the federal social security act by the firefighter's death; or

(b) Qualifies and has been filed for as a dependent under the age of eighteen (18) years on the firefighter's most recent internal revenue service income tax forms. [I.C., § 72-1429E, as added by 1990, ch. 249, § 11, p. 702.]

**STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429E 1963, ch. 125, § 8, p. 358, was repealed by comprising I.C., § 72-1429E, as added by section 3 of S.L. 1967, ch. 17.

**72-1429F. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429F was amended and redesignated as § 72-1446 by § 96 of S.L. 1990, ch. 231.

**72-1429G. Pension payment — Retirement of fireman incapacitated in performance of duty. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which § 5, p. 851, was repealed by S.L. 1980, ch. 50, comprised I.C., § 72-1429G, as added by § 1.  
1963, ch. 125, § 10, p. 358; am. 1978, ch. 331,



**72-1429H. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429H was amended and redesignated as § 72-1461 by § 100 of S.L. 1990, ch. 231.

**72-1429I. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429I was amended and redesignated as § 72-1462 by § 101 of S.L. 1990, ch. 231.

**72-1429J. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429J was amended and redesignated as § 72-1463 by § 102 of S.L. 1990, ch. 231.

**72-1429K. Death benefits — Widow and children of fireman dying from causes disconnected with duties but during service after five years. [Repealed.]****STATUTORY NOTES**

**Compiler's Notes.** — This section, comprising I.C., § 72-1429K, as added by S.L. 1963, ch. 125, § 14, p. 358 was repealed by S.L. 1969, ch. 19, § 2.

**72-1429L. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429L was amended and redesignated as § 72-1464 by § 103 of S.L. 1990, ch. 231.

**72-1429M. [Amended and Redesignated.]****STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1429M was amended and redesignated as § 72-1465 by § 104 of S.L. 1990, ch. 231.

**72-1429N, 72-1429O. Death benefits — Widow and children of fireman dying from causes disconnected with duties but during service after thirty or thirty-five years. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — These sections, p. 358, were repealed by S. L. 1976, ch. 273, which comprised I.C., §§ 72-1429N, 72-1429O, as added by 1963, ch. 125, §§ 17, 18, § 25.

**72-1429P. Workmen's compensation credit. [Repealed.]**

#### STATUTORY NOTES

**Compiler's Notes.** — This section, which 1963, ch. 125, § 19, p. 358, was repealed by comprised I. C., § 72-1429P, as added by S.L. 1980, ch. 50, § 1.

**72-1429Q. [Amended and Redesignated.]**

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1429Q was amended and redesignated as § 72-1444 by § 94 of S.L. 1990, ch. 231.

**72-1429R. [Amended and Redesignated.]**

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1429R was amended and redesignated as § 72-1441 by § 91 of S.L. 1990, ch. 231.

**72-1429S. [Amended and Redesignated.]**

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1429S was amended and redesignated as § 72-1443 by § 93 of S.L. 1990, ch. 231.

**72-1430. [Amended and Redesignated.]**

#### STATUTORY NOTES

**Compiler's Notes.** — Former § 72-1430 was amended and redesignated as § 72-1435 by § 90 of S.L. 1990, ch. 231.



**72-1430A — 72-1430G. Pension payment — Voluntary retirement after certain number of years. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — Sections 72-1430A 105, §§ 8 — 14, p. 179; am. 1976, ch. 273, — 72-1430G, which comprised I.C., §§ 72- §§ 13 — 19, p. 921, were repealed by S.L. 1430A — 72-1430G, as added by 1973, ch. 1980, ch. 50, § 1, effective October 1, 1980.

**72-1430H. [Amended and Redesignated.]**

**STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1430H was amended and redesignated as § 72-1445 by § 95 of S.L. 1990, ch. 231.

**72-1431. Contribution from firefighters — Manner of collection.**

— Beginning October 1, 1978, there is hereby levied upon and shall be paid to the public employee retirement system board, in addition to other provisions of payment to the board, a contribution from each paid firefighter establishing the right to benefits under the provisions of chapter 14, title 72, Idaho Code, as follows:

(a) For a paid firefighter who selected Option I, as provided in section 72-1434, Idaho Code, the contribution shall be equal to eleven and forty-five one hundredths percent (11.45%) of the average paid firefighter's salary or wage in the state;

(b) For a paid firefighter who selected Option II, as provided in section 72-1434, Idaho Code, the contribution shall be equal to eleven and forty-five one hundredths percent (11.45%) of his individual salary or wage.

The contribution shall be collected by the employer by deducting the amount of the contribution from the firefighter's wages or salary as and when paid. The contribution shall be remitted to the retirement board by the city or fire district employing the paid firefighter no later than five (5) days after each pay date. The average paid salary or wage or the individual firefighter's salary or wage, shall be calculated annually no later than the first day of September by the director, in the manner prescribed in section 72-1432, Idaho Code. The director shall notify each city and fire district of the amount of the contribution to be collected based on the average paid salary or wage or individual firefighter's salary or wage, as applicable, for all pay periods commencing on or after the first day of October. [1945, ch. 76, § 11, p. 112; am. 1957, ch. 185, § 1, p. 363; am. 1963, ch. 125, § 2, p. 358; am. 1973, ch. 105, § 1, p. 179; am. 1976, ch. 273, § 3, p. 921; am. 1978, ch. 331, § 3, p. 851; am. 1980, ch. 50, § 10, p. 79; am. and redesign. 1990, ch. 231, § 86, p. 611; am. 2004, ch. 295, § 1, p. 824.]

**STATUTORY NOTES**

**Compiler's Notes.** — This section was formerly compiled as § 72-1411. ignated as § 72-1442 by § 92 of S.L. 1990, ch. 231.

Former § 72-1431 was amended and reded-

Section 3 of S.L. 2004, ch. 295 provides:

"When calculating the initial average paid salary or wage or individual firefighter's salary or wage after July 1, 2004, salaries or wages paid through August 31, 2003, shall not be included when determining salaries or wages earned for the twelve (12) month period beginning July 1, 2003, and ending June 30, 2004."

**Effective Dates.** — Section 16 of S.L. 1973, ch. 105 provided sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.

### JUDICIAL DECISIONS

**Cited in:** *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979).

**72-1432. Pension fund contributions by cities and fire districts — Remittances.** — Beginning October 1, 1978, it shall also be the duty of the cities and fire districts of this state employing paid firefighters who are establishing the right to benefits under the provisions of chapter 14, title 72, Idaho Code, and of the boards and officers having authority therein, to cause to be remitted to the public employee retirement system board, as an incident to and part of the current expenses of such cities and fire districts, a sum equivalent to the total contribution rate and tax percentage paid into the Idaho public employee retirement system and the social security act on other public employees plus one percent (1%) thereafter of the average paid firefighter's salary or wage in the state of Idaho or the salary or wage of each individual firefighter, to be computed according to the classification of each firefighter under Option I or Option II as defined under section 72-1434, Idaho Code, for each paid firefighter employed by said cities or fire districts. The average paid salary or wage or individual firefighter's salary or wage shall be measured and determined by the actual salary or wage earned during the twelve (12) month period beginning July 1 and ending June 30 immediately preceding September 1. Sums shall be remitted no later than five (5) days after each pay date as provided for remittances for individual firefighters as set forth in section 72-1431, Idaho Code. [1945, ch. 76, § 12, p. 112; am. 1957, ch. 185, § 2, p. 363; am. 1963, ch. 125, § 3, p. 358; am. 1973, ch. 105, § 2, p. 179; am. 1976, ch. 273, § 4, p. 921; am. 1977, ch. 96, § 1, p. 201; am. 1978, ch. 331, § 4, p. 851; am. 1980, ch. 50, § 11, p. 79; am. and redesign. 1990, ch. 231, § 87, p. 611; am. 2000, ch. 13, § 4, p. 26; am. 2004, ch. 295, § 2, p. 824.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1412.

Former § 72-1432 was amended and redesignated as § 72-1434 by § 89 of S.L. 1990, ch. 231.

Section 3 of S.L. 2004, ch. 295 provides: "When calculating the initial average paid salary or wage or individual firefighter's salary or wage after July 1, 2004, salaries or wages paid through August 31, 2003, shall

not be included when determining salaries or wages earned for the twelve (12) month period beginning July 1, 2003, and ending June 30, 2004."

**Effective Dates.** — Section 16 of S.L. 1973, ch. 105 provided that sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.



Section 6 of S.L. 2000, ch. 13 provided that the act shall be in full force and effect on and after July 1, 2000.

### **72-1432A. [Amended and Redesignated.]**

#### **STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1432A was amended and redesignated as § 72-1404 by § 73 of S.L. 1990, ch. 231.

### **72-1432B. [Amended and Redesignated.]**

#### **STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1432B was amended and redesignated as § 72-1471 by § 105 of S.L. 1990, ch. 231.

### **72-1432C. [Amended and Redesignated.]**

#### **STATUTORY NOTES**

**Compiler's Notes.** — Former § 72-1432C was amended and redesignated as § 72-1451 by § 98 of S.L. 1990, ch. 231.

**72-1433. Failure of city or fire district to make payment — Effect.**  
— In event any city or fire district of this state shall fail to contribute to the public employee retirement system board for any cause whatever, the provisions of this chapter shall apply to and be available for the payment of benefits to firefighters employed by such municipality or subdivision if the contribution required of such city or fire district shall have been, in fact, paid from any source whatever. In the event that any city or fire district shall eliminate its paid fire department, the city or fire district shall continue to make its contribution prescribed by section 72-1432, Idaho Code, necessary to fund the payment of benefits vested in any paid firefighter, or then being paid to any retired firefighter or beneficiary, of such city or fire district. [1945, ch. 76, § 13, p. 112; am. 1976, ch. 273, § 5, p. 921; am. 1980, ch. 50, § 12, p. 79; am. and redesign. 1990, ch. 231, § 88, p. 611.]

#### **STATUTORY NOTES**

**Compiler's Notes.** — This section was formerly compiled as § 72-1413.

**72-1433A. Pension payment — Voluntary retirement after twenty years active service. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1433A, as added by 1978, ch. 331, § 8, p. 851, was repealed by S.L. 1980, ch. 50, § 1, effective October 1, 1980.

**72-1433B. Death benefits — Widow and children of fireman dying from causes unconnected with duties but during service after five years. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1433B, as added by 1978, ch. 331, § 9, p. 851, was repealed by S.L. 1980, ch. 50, § 1, effective October 1, 1980.

**72-1433C. Pension payment — Retirement of fireman incapacitated in the performance of duty. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1433C, as added by 1978, ch. 331, § 10, p. 851; am. 1979, ch. 146, § 3, p. 445, was repealed by S.L. 1980, ch. 50, § 1, effective October 1, 1980.

**72-1433D. Pension payment — Retirement of incapacitated fireman for nonservice. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1433D, as added by 1978, ch. 331, § 11, p. 851; am. 1979, ch. 146, § 4, p. 445, was repealed by S.L. 1980, ch. 50, § 1, effective October 1, 1980.

**72-1433E. Limitation on pension benefits of surviving spouse. [Repealed.]**

**STATUTORY NOTES**

**Compiler's Notes.** — This section, which comprised I.C., § 72-1433E, as added by 1978, ch. 331, § 12, p. 851, was repealed by S.L. 1980, ch. 50, § 1, effective October 1, 1980.

**72-1434. Optional pension amounts — Option I and Option II.** — Prior to July 1, 1976, but not thereafter, any paid firefighter in this state, as defined in subsection (A) of section 72-1403, Idaho Code, may elect to receive his or her retirement benefits in accordance with the provisions of Option I or Option II as hereinafter set forth. Except as otherwise provided in this chapter, in the event a firefighter fails to elect an option prior to July 1, 1976, then his or her pension benefits shall be paid to him under the provisions as



set forth in Option I. Selection of option shall be nominated by written designation duly executed and filed with the public employee retirement system board. Any paid firefighter employed in the state by a city or fire district, on or after July 1, 1976, shall be employed under the provisions as set forth in Option II; provided however, that any paid firefighter employed on or after July 1, 1976, who has consistently been treated as an Option I firefighter for contribution purposes may, prior to retirement, make an election to select either Option I or Option II; provided further, that any such paid firefighter who selects Option II shall, prior to retirement, pay any additional required employee contributions and the firefighter's employer shall pay any additional required employer contributions, as determined by the board.

(1) **OPTION I** — On or after July 1, 1976, any employed paid firefighter, as defined in subsection (A) of section 72-1403, Idaho Code, electing this option or failing to nominate an option, after payment of the contribution, as set forth in section 72-1431, Idaho Code, and after completion of years active service, as defined in subsection (H) of section 72-1403, Idaho Code, may at his or her option retire, and in the event of such retirement said firefighter shall be paid from the public employee retirement account a monthly sum during the remainder of his life equal to the percentage of the average paid firefighter's salary or wage in this state, as defined in section 72-1431, Idaho Code, and that said firefighter is entitled to under the provisions of this chapter, which said monthly sum shall vary annually, according to the determination of the cost of living adjustment as set forth in section 72-1471, Idaho Code.

(2) **OPTION II** — On or after October 1, 1979, any paid firefighter, as defined in subsection (A) of section 72-1403, Idaho Code, who elected Option II, or who was employed after July 1, 1976, after payment of the contribution, as set forth in section 72-1431, Idaho Code, and after completion of years [years'] active service, as defined in section 72-1403(H), Idaho Code, may at his or her option retire, and in the event of such retirement he or she shall be paid from the public employee retirement account a monthly sum during the remainder of his or her life equal to the percentage of said firefighter's average monthly salary or wage, as defined in section 72-1431, Idaho Code, that said firefighter is entitled to under the provisions as set forth in this chapter, based on his or her "average final compensation," as defined in section 72-1404, Idaho Code, which said monthly sum shall vary annually according to the determination of the cost of living adjustment as set forth in section 72-1471, Idaho Code. [I.C., § 72-1432, as added by 1976, ch. 273, § 21, p. 921; am. 1980, ch. 50, § 35, p. 79; am. and redesign. 1990, ch. 231, § 89, p. 611; am. 2001, ch. 327, § 1, p. 1153.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1432.

Former § 72-1434 was amended and redesignated as § 72-1452 by § 99 of S.L. 1990, ch. 231.

**Effective Dates.** — Section 46(1) of S.L.

1980, ch. 50 declared an emergency and provided that this section should be in full force and effect retroactively to October 1, 1979. Approved March 10, 1980.

Section 2 of S.L. 2001, ch. 327 declared an emergency. Approved April 4, 2001.

**72-1435. Voluntary retirement — Years of service determine pension benefit.** — (1) Any Option I firefighter, as provided in section 72-1434, Idaho Code, who has had the contributions remitted as provided in sections 72-1431 and 72-1432, Idaho Code, for the same number of years as he claims for service as a paid firefighter in Idaho, may at his option retire, and upon retirement shall be paid from the public employee retirement account a monthly sum during the remainder of his life equal to:

- (a) after twenty (20) years of service and contributions, forty percent (40%) of the average paid firefighter's salary or wage; or
- (b) after twenty-one (21) years of service and contributions, forty-five percent (45%) of the average paid firefighter's salary or wage; or
- (c) after twenty-two (22) years of service and contributions, fifty percent (50%) of the average paid firefighter's salary or wage; or
- (d) after twenty-three (23) years of service and contributions, fifty-five percent (55%) of the average paid firefighter's salary or wage; or
- (e) after twenty-four (24) years of service and contributions, sixty percent (60%) of the average paid firefighter's salary or wage; or
- (f) after twenty-five (25) years of service and contributions, sixty-five percent (65%) of the average paid firefighter's salary or wage.

All benefit payments to Option I firefighters shall be based on the average paid firefighter's salary or wage in this state as defined in section 72-1431, Idaho Code. Option I monthly benefit payments shall vary annually according to the determination of the cost of living adjustment as set forth in section 72-1471, Idaho Code.

(2) Any Option II firefighter, as provided in section 72-1434, Idaho Code, who has had the contributions remitted as provided in sections 72-1431 and 72-1432, Idaho Code, for the same number of years as he claims for service as a paid firefighter in Idaho, may at his option retire, and upon retirement shall be paid from the public employee retirement account a monthly sum during the remainder of his life equal to:

- (a) after twenty (20) years of service and contributions, forty percent (40%) of his average salary or wage; or
- (b) after twenty-one (21) years of service and contributions, forty-five percent (45%) of his average salary or wage; or
- (c) after twenty-two (22) years of service and contributions, fifty percent (50%) of his average salary or wage; or
- (d) after twenty-three (23) years of service and contributions, fifty-five percent (55%) of his average salary or wage; or
- (e) after twenty-four (24) years of service and contributions, sixty percent (60%) of his average salary or wage; or
- (f) after twenty-five (25) years of service and contributions, sixty-five percent (65%) of his average salary or wage.

All benefit payments to Option II firefighters shall be based on his average final compensation as defined in section 72-1404, Idaho Code. Option II monthly benefit payments shall vary annually according to the determination of the cost of living adjustment as set forth in section 72-1471, Idaho Code. [I.C., § 72-1430, as added by 1980, ch. 50, § 32, p. 79; am. 1990, ch. 211, § 5, p. 471; am. and redesign. 1990, ch. 231, § 90, p. 611.]



### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1430.

### JUDICIAL DECISIONS

**Cited in:** *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988).

### 72-1436 — 72-1440. [Reserved.]

**72-1441. Date of payment.** — All claims for benefits originating under Option II from and after October 1, 1979 shall be payable as provided in section 72-1434 through section 72-1451, Idaho Code. All claims for benefits being paid or originating prior to October 1, 1979 shall be payable as provided in section 72-1447, Idaho Code, so long as such claims or benefits are entitled to be paid, as that section existed prior to July 1, 1976; provided, however, that any firefighter incapacitated in the performance of duty prior to the effective date of any claims under this chapter shall be entitled to benefits under Option II, if said firefighter and his or her employer have been contributing the required contributions under sections 72-1431 and 72-1432, Idaho Code. [I.C., § 72-1429R, as added by 1963, ch. 125, § 21, p. 358; am. 1976, ch. 273, § 12, p. 921; am. 1980, ch. 50, § 30, p. 79; am. and redesisg. 1990, ch. 231, § 91, p. 611.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1429R.

**Effective Dates.** — Section 46(1) of S.L. 1980, ch. 50 declared an emergency and pro-

vided that this section should be in full force and effect retroactively to October 1, 1979. Approved March 10, 1980.

**72-1442. Pension payment — Maximum.** — (1) No paid firefighter, retiring under the provisions of chapter 14, title 72, Idaho Code, shall receive more than one hundred percent (100%) of the firefighter's average compensation for the three (3) consecutive years which produce the greatest aggregate compensation, which said monthly sum shall vary annually according to the determination of the "cost of living adjustment" as set forth in section 72-1471, Idaho Code.

(2) As the amount, terms and conditions of benefits under this chapter may be revised from time to time, the application of such revisions shall be prospective only and not retrospective or retroactive unless otherwise provided by law. [I.C., § 72-1431, as added by 1973, ch. 105, § 15, p. 179; am. 1976, ch. 273, § 20, p. 921; am. 1980, ch. 50, § 34, p. 79; am. and redesisg. 1990, ch. 231, § 92, p. 611; am. 2000, ch. 13, § 5, p. 26.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1431.

**Effective Dates.** — Section 16 of S. L.

1973, ch. 105 provided sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14

should take effect on and after January 1, 1976.

the act shall be in full force and effect on and after July 1, 2000.

Section 6 of S.L. 2000, ch. 13 provided that

**72-1443. Accrued pension payment — Firefighters discontinuing service prior to voluntary retirement.** — A paid firefighter, irrespective of date of hire, who has at least five (5) years of continuous service as defined in section 72-1403, subsections (E) and (H), Idaho Code, and who discontinues service with the city or fire district prior to meeting voluntary retirement or disability requirements, and who has not withdrawn his contributions as provided in section 72-1445, Idaho Code, shall be eligible, only after reaching sixty (60) years of age, to receive a monthly service retirement benefit equal to two percent (2%) of his average monthly salary, as defined in section 72-1431, Idaho Code, for each year of credited service, adjusted by the cost of living adjustment as provided under section 72-1471, Idaho Code. [I.C., § 72-1429S, as added by 1978, ch. 331, § 6, p. 851; am. 1980, ch. 50, § 31, p. 79; am. and redessig. 1990, ch. 231, § 93, p. 611.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1429S.

#### JUDICIAL DECISIONS

**Cited in:** *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979).

**72-1444. Refund to firefighter terminating employment — Repayment on reemployment — Conversion of contributions — Purchase of service credits.** — (1) If the employment of a paid firefighter, irrespective of date of hire, as defined in this chapter, is terminated for any reason prior to the completion of twenty (20) years of service, and he cannot qualify for benefits under any other provision of this chapter, he shall be entitled to receive at the time of said termination one hundred percent (100%) of his accumulated contributions. If such firefighter is subsequently reemployed as a paid firefighter with duties which involve or are incidental to firefighting, he may reinstate his previous credited service by repaying to the retirement fund the full amount of his accumulated contributions provided such repayment includes payment of interest as determined by the board.

(2) In lieu of withdrawing his accumulated contributions as provided in subsection (1) of this section, a paid firefighter may elect to convert his accumulated contributions to an equivalent benefit entitlement under the provisions of chapter 13, title 59, Idaho Code, as if such contributions had been made by the firefighter at the contribution rate of a paid firefighter under the provisions of chapter 13, title 59, Idaho Code; this conversion will normally result in a higher "years of service" factor than the firefighter actually served under the provisions of chapter 14, title 72, Idaho Code. It is legislative intent that this is precisely the effect to be achieved.



(3) No paid firefighter may elect to proceed under the provisions of subsection (2) until he has been personally interviewed and advised by the director of the public employee retirement system, or his designee, on the choices available. The firefighter may be accompanied during such interview by any person of his choice.

(4) Paid firefighters who did not participate as a member of the system between January 1, 1978, and December 31, 1981, because of termination from employment due to reductions in work force may purchase service credits for all or part of that period. The cost of such service credit shall be the full actuarial cost as determined by the board and shall be paid in full prior to the effective date of retirement. The employer may elect, but is not required, to participate in purchasing service credit under this section. In no event shall the retirement system be liable for payment of any such costs. Terminations from employment due to a reduction in work force are limited to terminations that resulted from the elimination of a position due to budgetary constraints. [I.C., § 72-1429Q, as added by 1963, ch. 125, § 20, p. 358; am. 1972, ch. 43, § 1, p. 66; am. 1980, ch. 50, § 29, p. 79; am. and redesig. 1990, ch. 231, § 94, p. 611; am. 1991, ch. 26, § 2, p. 49; am. 2000, ch. 322, § 1, p. 1089.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1429Q.

#### JUDICIAL DECISIONS

##### **Community Property Interest.**

Where husband, a fireman for 19 and one-half years, and wife were divorced, the trial court erred in holding the value of the couple's community property interest in the fund on the date of divorce was the cash surrender

value of \$8,089.24. *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979).

**Cited in:** *Deonier v. State*, Pub. Employee Retirement Bd., 114 Idaho 721, 760 P.2d 1137 (1988).

**72-1445. Pension payment — Retirement of firefighter incapacitated in the performance of duty.** — (1) Any paid firefighter incapacitated by injury in the performance of duty, or by illness attributable wholly or partially to service as a paid firefighter, shall be retired so long as such disability shall continue in a degree which prevents efficient service, limited to a maximum of two (2) years, and during such disability shall be paid from the public employee retirement account the monthly retirement sum to which he would be entitled if he elected to retire, but in no event less than a monthly sum equal to: (a) sixty-five per cent (65%) of the average paid firefighter's salary or wage in this state if the incapacitated firefighter is an Option I firefighter; or, (b) sixty-five per cent (65%) of the said firefighter's average monthly salary or wage, based on his average final compensation, if the incapacitated firefighter is an Option II firefighter. The monthly sum shall vary annually according to the cost of living adjustment as set forth in section 72-1471, Idaho Code.

Upon application of a firefighter or his or her department head for a service disability retirement, and prior to said retirement, a medical

examination of said firefighter shall be given by a medical committee consisting of a physician named by the public employee retirement system board, a physician named by the firefighter claiming benefits, and a third physician designated by the first two (2) physicians so named. If the medical committee, by a majority opinion certifies in writing, that: (1) the firefighter is physically incapacitated for the efficient performance of the duties as a paid firefighter, as defined under the provisions of subsection (G), section 72-1403, Idaho Code, in the service of the city or fire district, (2) such incapacity is likely to be permanent, (3) the member should be retired, and (4) there is medical evidence of probative value including reports of clinical findings (such as the individual's medical history, physical status examinations), laboratory findings, diagnosis and treatment prescribed and response to such treatment, the public employee retirement system board may approve such application for retirement as provided herein.

If the disabled firefighter is still retired at the conclusion of the two (2) year period, the public employee retirement system board shall determine whether the disability renders the disabled firefighter totally incapacitated. "Totally incapacitated" as used in this section means the inability to perform work in any remunerative employment. It is not necessary for a person to be absolutely helpless or entirely unable to do anything worthy of compensation to be considered totally incapacitated. If the person is so incapacitated that substantially all the avenues of gainful employment are reasonably closed to him, his condition is within the meaning of "totally incapacitated." In evaluating whether a person is totally incapacitated, the medical factor of permanent impairment and nonmedical factors such as age, sex, education, economic and social environment, and training and usable skills shall be considered. If the disabled firefighter is totally incapacitated, then payments shall continue at the rate prescribed in this section during the period of total incapacity. A medical committee may be summoned to determine total incapacity as provided above.

(2) If the disabled firefighter is less than totally incapacitated at the end of the two (2) year period, but has a disability which reduces his presumed ability to engage in gainful activity, payments shall be made to the disabled firefighter during the period of his disability as hereinafter provided. The board shall determine the percentage of disability suffered by the disabled firefighter as compared to the whole man. A medical committee, comprised as prescribed in this section, may be summoned to determine the percentage of disability suffered by the disabled firefighter. The disabled firefighter shall receive a disability benefit equal to the percentage that his disability bears to a totally incapacitated person.

(3) The public employee retirement system board shall provide and maintain disability benefits for all paid firefighters. Their benefits shall be as follows:

(a) For those paid firefighters who were hired for the first time between October 1, 1980, and July 1, 1993, the benefits provided shall be at least equal to those provided to an Option II firefighter. The benefits shall be maintained only until a paid firefighter is eligible for disability retirement under the provisions of chapter 13, title 59, Idaho Code. The costs for such



benefits shall be paid from the appropriation made in section 59-1394(1)(b), Idaho Code.

(b) For those paid firefighters hired after July 1, 1993, the benefits and eligibility therefor shall be as provided in chapter 13, title 59, Idaho Code. [I.C., § 72-1430H, as added by 1976, ch. 170, § 1, p. 622; am. 1976, ch. 273, § 8, p. 921; am. 1979, ch. 146, § 2, p. 445; am. 1980, ch. 50, § 33, p. 79; am. 1990, ch. 211, § 6, p. 471; am. and redesign. 1990, ch. 231, § 95, p. 611; am. 1991, ch. 26, § 2, p. 49; am. 1993, ch. 178, § 2, p. 458.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1430H.

The words enclosed in parentheses so appeared in the act.

Section 1 of S.L. 2006, ch. 253 provided "That Chapter 211, Laws of 1990, be, and the same is hereby amended by the addition thereto of a new section, to be known and designated as Section 8, Chapter 211, Laws of 1990, and to read as follows:

"SECTION 8. The provisions of Section 6 of this act [Chapter 211, Laws of 1990] shall be deemed to apply to all paid firemen hired on or after July 1, 1978, and before October 1, 1980, who are incapacitated in the performance of duty and whose retirement date was prior to April 3, 1990, provided, however, that

no interest shall accrue on any benefit payments due such firemen pursuant to this Section 8, and provided further that no such benefit payments made pursuant to this Section 8, shall be considered underpayments under Section 59-1327(6), Idaho Code."

Section 3 of S.L. 2006, ch. 253 provided "An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to April 3, 1990."

**Effective Dates.** — Section 2 of S. L. 1976, ch. 170 declared an emergency and provided the act should be in full force and effect on and after approval retroactive to January 1, 1976. Approved March 19, 1976.

**72-1446. Pension payment — Retirement of incapacitated firefighters for nonservice.** — (1) Any paid firefighter with not less than five (5) years' active service as defined in subsection (H) of section 72-1403, Idaho Code, as a paid firefighter who shall become totally incapacitated by reason of a personal injury or disease occurring as the result of causes arising outside the course of his employment by the city or fire district, shall, so long as he remains totally incapacitated be paid a monthly sum equal to: (a) two per cent (2%) of the average paid firefighter's salary or wage, as defined in section 72-1431, Idaho Code, in this state for each year's active service, if the incapacitated firefighter is an Option I firefighter; or, (b) a monthly sum equal to two per cent (2%) of the said firefighter's average monthly salary or wage, as defined in section 72-1431, Idaho Code, for each year's active service based on his average final compensation, as defined in section 72-1404, Idaho Code, if the incapacitated firefighter is an Option II firefighter. "Totally incapacitated" as used in this section means the inability to perform work in any remunerative employment. It is not necessary for a person to be absolutely helpless or entirely unable to do anything worthy of compensation to be considered totally incapacitated. If the person is so incapacitated that substantially all the avenues of gainful employment are reasonably closed to him, his condition is within the meaning of "totally incapacitated." In evaluating whether a person is totally incapacitated, the medical factor of permanent impairment and nonmedical factors such as age, sex, education, economic and social environment, and training and usable skills shall be considered.

(2) In the event said firefighter has twenty-one (21) or more years' service, and has otherwise met the requirements of section 72-1435, Idaho Code, if applicable, the monthly sum shall be the same amount as would be payable in the case of voluntary retirement.

(3) The monthly benefits provided for in this section shall vary annually according to the cost of living adjustment as set forth in section 72-1471, Idaho Code.

(4) Upon application of a firefighter or his or her department head for a nonservice disability retirement, and prior to said retirement, a medical examination of said firefighter shall be given by a medical committee, consisting of a physician named by the public employee retirement system board, a physician named by the firefighter claiming benefits, and a third physician designated by the first two (2) physicians so named. If the medical committee, by a majority opinion certifies in writing, that the firefighter is mentally or physically totally incapacitated the board may approve such application for retirement as provided herein.

(5) All paid firefighters who are receiving nonservice disability benefits shall be subject to the provisions of sections 72-1451 and 72-1452, Idaho Code. [I.C., § 72-1429F, as added by 1963, ch. 125, § 9, p. 358; am. 1967, ch. 17, § 4, p. 33; am. 1973, ch. 105, § 3, p. 179; am. 1976, ch. 273, § 7, p. 921; am. 1979, ch. 146, § 1, p. 445; am. 1980, ch. 50, § 24, p. 79; am. 1990, ch. 211, § 1, p. 471; am. and redesign. 1990, ch. 231, § 96, p. 611.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1429F.

**Effective Dates.** — Section 16 of S.L. 1973, ch. 105 provided sections 1-7 and sec-

tion 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.

### JUDICIAL DECISIONS

#### ANALYSIS

Constitutionality.  
Effect of amendments.

#### Constitutionality.

To the extent that the purpose of the 1973 amendments was to increase the retirement benefits for firemen who retired either voluntarily or non-voluntarily, the amendment to this section by S.L. 1973, ch. 105, § 3 violated the equal protection clause of the Fourteenth Amendment in that its effect was to substantially diminish the retirement benefits of a fireman who retired in 1974 after 23 years' service because of a nonservice-connected disability. *Lynn v. Kootenai County Fire Protective Dist. #1*, 97 Idaho 623, 550 P.2d 126 (1976).

#### Effect of Amendments.

Where a fireman, who retired in 1974 after

23 years' service because of a nonservice-connected disability, would have received substantially more benefits had he retired prior to January 1, 1974 or after January 1, 1976, and where others with 15 to 20 years' service would have received the same or more benefits than the foreman if they had retired on the same day, fireman was entitled to retirement benefits pursuant to this section as it existed prior to 1973 amendment. *Lynn v. Kootenai County Fire Protective Dist. #1*, 97 Idaho 623, 550 P.2d 126 (1976).

**Cited in:** *Deonier v. State, Pub. Employee Retirement Bd.*, 114 Idaho 721, 760 P.2d 1137 (1988).



**72-1447. Payment of pensions — Amount to be paid — Parties entitled thereto.** — Any firefighter, spouse, child or children of a firefighter entitled to compensation under the Workers' Compensation Law, shall draw benefits under this chapter only to the extent that the benefits under this chapter exceed those to which he or she shall be entitled under the Workers' Compensation Law of Idaho. In no case, however, will a firefighter's regular retirement benefit be equal to more than one hundred per cent (100%) of the firefighter's average compensation for the three (3) consecutive years of employment which produce the greatest aggregate compensation. If the benefit is calculated to exceed one hundred per cent (100%) of the firefighter's average compensation, the firefighter shall be eligible for and may choose either:

(1) An annual service retirement allowance equal to the firefighter's average annual compensation for the three (3) consecutive years of employment which produced the greatest aggregate compensation; or

(2) A separation benefit. [1945, ch. 76, § 14, p. 112; am. 1947, ch. 159, § 1, p. 409; am. 1949, ch. 152, § 1, p. 327; am. 1957, ch. 185, § 3, p. 363; am. 1970, ch. 121, § 1, p. 292; am. 1976, ch. 273, § 6, p. 921; am. 1980, ch. 50, § 13, p. 79; am. 1990, ch. 249, § 10, p. 702; am. and redesisg. 1990, ch. 231, § 97, p. 611; am. 1993, ch. 350, § 12, p. 1295.]

### STATUTORY NOTES

**Cross References.** — Maximum pension payment, § 72-1442.

**Compiler's Notes.** — This section was formerly compiled as § 72-1414.

**Effective Dates.** — Section 2 of S.L. 1949, ch. 152 declared an emergency. Approved March 4, 1949.

Section 21 of S.L. 1963, ch. 125 originally enacted as § 72-1429R (amended and redesis-

gnated as § 72-1441 by § 91 of S.L. 1990, ch. 231) provided that two years after the effective date of S.L. 1963, ch. 125, the provisions of §§ 72-1429A—72-1429R became applicable to claims for benefit originating after that date.

Section 2 of S.L. 1970, ch. 121 provided that this act should be in full force and effect on and after July 1, 1970.

### JUDICIAL DECISIONS

#### ANALYSIS

Constitutionality.  
Offsetting of benefits.  
Widow.

#### Constitutionality.

Since this section burdens only those firefighters who are members of the Firemen's Retirement Fund (FRF) and are subject to involuntary retirement because of injuries resulting in the award of worker's compensation benefits, it classifies both on the basis of involuntary retirement versus voluntary retirement, and membership in the FRF versus the Public Employees Retirement Board (PERS) system, and the classification is arbitrary as between the firefighter injured early in his career, who ultimately receives 100% of both his worker's compensation and retirement, and the firefighter injured shortly be-

fore retirement who suffers the reduction, the offset provisions of this section are inoperative as violative of equal protection of the law. *Deonier v. State*, Pub. Employee Retirement Bd., 114 Idaho 721, 760 P.2d 1137 (1988) (decision prior to 1976 amendment).

The new administrative interpretation of this section as requiring that disability retirement benefits be offset by the amount of lump sum worker's compensation benefits previously received materially altered contractual expectations regarding the vested rights of firefighters subject to the Firemen's Retirement Fund, creating an unconstitutional impairment of contract. *Deonier v. State*, Pub.

Employee Retirement Bd., 114 Idaho 721, 760 P.2d 1137 (1988) (decision prior to 1976 amendment).

#### **Offsetting of Benefits.**

On its face, this section operates to decrease the amount of disability retirement benefits received by employees by the amount of worker's compensation benefits they are entitled to receive, but reasonable interpretation of this section does not allow for any offsetting of worker's compensation benefits from moneys earned as deferred wages. *Deonier v. State*,

Pub. Employee Retirement Bd., 114 Idaho 721, 760 P.2d 1137 (1988) (decision prior to 1976 amendment).

#### **Widow.**

This section grants to the fireman's surviving widow the right to claim death benefits under firemen's retirement fund, only in the event her husband is killed, or sustains injury from which his death results, while in the performance of his duty. *Branson v. Firemen's Retirement Fund*, 79 Idaho 167, 312 P.2d 1037 (1957).

### **72-1448 — 72-1450. [Reserved.]**

#### **72-1451. Disability — Reexamination — Return to service. —**

Irrespective of the date of retirement, at least once each year during the first five (5) years following the retirement of a firefighter with a disability retirement pension and in any three (3) year period thereafter, the public employee retirement system board may, or upon the disabled firefighter's application shall, require the disabled firefighter to undergo a medical examination, to be made by or under the direction of a physician designated by the board, at the place of residence of said disabled firefighter or other place mutually agreed upon. Should any disabled firefighter refuse to submit to such medical examination in any period, his or her disability retirement may be discontinued by the board and should such refusal continue for one (1) year all his or her rights in and to his or her disability retirement pension shall be revoked by the board. If upon such medical examination of said disabled firefighter, the said physician reports to the board that said disabled firefighter is physically able and capable of resuming employment in the classification held by him or her at the time of his or her retirement, he or she shall be restored to active service in the employment of the city or fire district and payment of his or her disability retirement shall cease, provided the report of the physician is concurred in by the board. A disabled firefighter so restored to active service shall from the date of his or her return to service become a member of the retirement system, thereafter in the same manner as prior to his or her disability retirement. Any service credited to him or her at the time of his or her disability retirement shall be restored to full force and effect. He or she shall be given credit for the period he or she was receiving service disability pension, provided under section 72-1445, Idaho Code; he or she shall not be given service credit for the period he or she was receiving a nonservice disability pension, provided under section 72-1446, Idaho Code. When a disabled firefighter on a disability retirement engages in work activities commensurate with the physical demands that were required in his or her classification as a firefighter, the work performed may demonstrate that said firefighter has the ability to be restored as a firefighter in the employ of the city or fire district. However, the circumstances under which the work was performed generally must be considered. Where said disabled firefighter has to discontinue his or her work after a short time because of his or her impairment, his or her work activities would not demonstrate



ability to resume his or her employment as a firefighter. The findings of the adequacy of the said firefighter's performance of work activities must be concurred in by the board. If said firefighter has a disability which is amenable to corrective treatment that could be expected to restore his or her efficient performance of duties of a paid firefighter, as defined in section 72-1403(G), Idaho Code, he or she would be considered disabled, provided he or she is undergoing the treatment prescribed by the medical committee, as set forth in section 72-1445, Idaho Code.

However, nothing in this section shall be construed to require a firefighter who in good faith relies on or is treated by prayer through spiritual means alone by a duly accredited practitioner of a well-recognized church to undergo any medical or surgical treatment, nor shall he or his dependents be deprived of any benefits hereunder to which he would have been entitled if medical or surgical treatment were employed. [I.C., § 72-1432C, as added by 1976, ch. 273, § 24, p. 921; am. 1980, ch. 50, § 37, p. 79; am. 1990, ch. 249, § 17, p. 702; am. and redesisg. 1990, ch. 231, § 98, p. 611.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1432C.

**Effective Dates.** — Section 18 of S.L.

1990, ch. 249 declared an emergency. Approved April 5, 1990.

**72-1452. Review of disability.** — Upon application of a firefighter receiving a disability benefit, irrespective of the date of retirement, whether service or nonservice connected, or upon the board's own motion, the disability shall be reviewed by the board to determine whether a change of condition has occurred which would justify increasing or decreasing the disability benefit. The board may make such order as is appropriate. Such review shall only occur once every three (3) years after the date of the first disability payment. [I.C., § 72-1434, as added by 1979, ch. 146, § 5, p. 445; am. 1980, ch. 50, § 38, p. 79; am. and redesisg. 1990, ch. 231, § 99, p. 611.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1434.

**Effective Dates.** — Section 6 of S.L. 1979, ch. 146 declared an emergency. Approved March 27, 1979.

Section 46 of S.L. 1980, ch. 50 read: "The provisions of this act shall be in full force and effect according to the schedule established by this section.

(1) An emergency existing therefor, which emergency is hereby declared to exist, section 72-1429R, Idaho Code, as amended by section 30 of this act, and section 72-1432, as amended by section 35 of this act, shall be in full force and effect on and after its passage and approval, and retroactively to October 1, 1979.

(2) So much of section 72-1428, Idaho Code, as amended by section 23 of this act, as

relates to the requirement that the public employee retirement system board adopt rules and regulations shall be in full force and effect on and after July 1, 1980, but the rules adopted by the board shall have no effect until October 1, 1980, and the balance of section 72-1428, Idaho Code, shall be in full force and effect on and after October 1, 1980.

(3) So much of section 59-1357(1)(b), Idaho Code, as amended by section 44 of this act, as relates to the appropriation of the tax on fire insurance premiums to the public employee retirement account commencing July 1, 1980, shall be in full force and effect on and after July 1, 1980, and the balance of section 59-1357, Idaho Code, shall be in full force and effect on and after October 1, 1980.

(4) All other sections of this act shall be in

full force and effect on and after October 1, 1980."

**72-1453 — 72-1460. [Reserved.]**

**72-1461. Death benefits — Spouse and the surviving child or children of firefighter killed in performance of duty.** — (1) In the event a paid firefighter is killed or sustains injury from which death results, while in the performance of duty and leaves surviving a spouse or a spouse with the firefighter's surviving child or children, the spouse, during his or her lifetime, shall be paid from the public employee retirement account the same pension the deceased firefighter would have been entitled to had the deceased firefighter retired as of the date of death, but in no event less than a monthly sum equal to: (a) sixty-five percent (65%) of the average paid firefighter's salary or wage in this state, if the deceased firefighter was an Option I firefighter, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code; or, (b) sixty-five percent (65%) of the deceased firefighter's average monthly salary or wage, based on his average final compensation, if the deceased firefighter was an Option II firefighter, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code. If the surviving spouse should die, the full retirement pay shall be paid to the firefighter's surviving child or children until they reach the age of eighteen (18) years or shall marry, whichever occurs first; provided, however, that if said deceased firefighter shall have died without leaving a surviving spouse and leaving surviving a child or children, said firefighter's surviving child or children shall be entitled to be paid from the public employee retirement account the same pension the deceased firefighter would have been entitled to had the deceased firefighter retired as of the date of death, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code, until they shall reach the age of eighteen (18) years or shall marry, whichever occurs first.

(2) The monthly benefits provided for in this section shall vary annually according to the cost of living adjustment as set forth in section 72-1471, Idaho Code.

(3) Those benefits payable under the provisions of subsection (1), or under the provisions of section 72-1429G, Idaho Code, which were ordered prior to July 1, 1978, shall continue under the provisions of this chapter in effect at the time such benefit payment was ordered.

(4) Eligibility for benefits of surviving spouses that was terminated on or after July 1, 1987, solely because of the spouse's remarriage is hereby reinstated effective July 1, 1992. Such spouses are entitled to have the benefits, including any cost of living allowances approved by the board effective on or after July 1, 1987, commence prospectively effective July 1, 1992, or upon their application to the retirement system, whichever is later. [I.C., § 72-1429H, as added by 1963, ch. 125, § 11, p. 358; am. 1973, ch. 105, § 4, p. 179; am. 1980, ch. 50, § 25, p. 79; am. 1990, ch. 211, § 2, p. 471; am.



1990, ch. 249, § 12, p. 702; am. and redesisg. 1990, ch. 231, § 100, p. 611; am. 1991, ch. 27, § 1, p. 51; am. 1992, ch. 123, § 1, p. 402; am. 2006, ch. 19, § 3, p. 71.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 19, inserted “less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code” three times in subsection (1).

**Compiler's Notes.** — This section was formerly compiled as § 72-1429H.

Section 72-1429G, referred to in subsection

(3) of this section, was been repealed, by S.L. 1980, ch. 50, § 1.

**Effective Dates.** — Section 16 of S.L. 1973, ch. 105 provided sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.

### RESEARCH REFERENCES

**A.L.R.** — Rights in survival benefits under public pension or retirement plan as between designated beneficiary and heirs, legatees, or

personal representative of deceased employee. 5 A.L.R.3d 644.

**72-1462. Death benefits — Spouse of retired firefighter.** — (1) In the event a paid firefighter, retired on retirement pay, shall die and leave surviving a spouse, but no minor children, such surviving spouse shall receive for life the retirement benefits to which the deceased firefighter was entitled, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code.

(2) Those benefits payable under the provisions of subsection (1) which were ordered prior to July 1, 1978, shall continue under the provisions of this chapter in effect at the time such benefit payment was ordered.

(3) Eligibility for benefits of surviving spouses that was terminated on or after July 1, 1987, solely because of the spouse's remarriage is hereby reinstated effective July 1, 1992. Such spouses are entitled to have the benefits, including any cost of living allowances approved by the board effective on or after July 1, 1987, commence prospectively effective July 1, 1992, or upon their application to the retirement system, whichever is later. [I.C., § 72-1429I, as added by 1963, ch. 125, § 12, p. 358; am. 1973, ch. 105, § 5, p. 179; am. 1976, ch. 273, § 9, p. 921; am. 1980, ch. 50, § 26, p. 79; am. 1990, ch. 249, § 13, p. 702; am. and redesisg. 1990, ch. 231, § 101, p. 611; am. 1991, ch. 27, § 2, p. 51; am. 1992, ch. 123, § 2, p. 402; am. 1992, ch. 281, § 1, p. 859; am. 2006, ch. 19, § 4, p. 71.]

### STATUTORY NOTES

**Amendments.** — This section was amended by two 1992 acts, ch. 123, § 2 and ch. 281, § 1, both of which are effective July 1, 1992 and which appear to be compatible and have been compiled together.

The 1992 amendment, by ch. 123, § 2, added subsection (3).

The 1992 amendment, by ch. 281, § 1, deleted “who was such spouse for over five (5) years immediately prior to said firefighter's

death” following “surviving a spouse” in subsection (1).

The 2006 amendment, by ch. 19, added “less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code” at the end of subsection (1).

**Compiler's Notes.** — This section was formerly compiled as § 72-1429I.

**Effective Dates.** — Section 16 of S.L.

1973, ch. 105 provided sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.

**72-1463. Death benefits — Surviving spouse and surviving child or children of retired firefighter.** — (1) In the event a paid firefighter, retired on retirement pay, shall die and leave surviving a spouse, or a spouse and firefighter's surviving child or children, the spouse, during the spouse's lifetime shall be paid the retirement pay to which the deceased firefighter was eligible. If the surviving spouse dies the same retirement pay shall be paid to the firefighter's surviving child or children until they reach the age of eighteen (18) years or shall marry, whichever occurs first. Should a paid firefighter, retired on retirement pay, die without leaving a surviving spouse, and leave surviving him or her a minor child or children, said child or children shall be entitled to receive the pension to which said firefighter was entitled until they marry or shall attain eighteen (18) years of age, whichever occurs first.

(2) Eligibility for benefits of surviving spouses that was terminated on or after July 1, 1987, solely because of the spouse's remarriage is hereby reinstated effective July 1, 1992. Such spouses are entitled to have the benefits, including any cost of living allowances approved by the board effective on or after July 1, 1987, commence prospectively effective July 1, 1992, or upon their application to the retirement system, whichever is later. [I.C., § 72-1429J, as added by 1963, ch. 125, § 13, p. 358; am. 1990, ch. 249, § 14, p. 702; am. and redesi. 1990, ch. 231, § 102, p. 611; am. 1991, ch. 27, § 3, p. 51; am. 1992, ch. 123, § 3, p. 402; am. 1992, ch. 281, § 2, p. 859; am. 2006, ch. 19, § 5, p. 71.]

#### STATUTORY NOTES

**Amendments.** — This section was amended by two 1992 acts, ch. 123, § 3, and ch. 281, § 2, both of which are effective July 1, 1992, and which appear to be compatible and have been compiled together.

The 1992 amendment, by ch. 123, § 2, added subsection (2).

The 1992 amendment, by ch. 281, § 2, deleted "of over five (5) years immediately

prior to said firefighter's death" following "surviving a spouse" in the first sentence of subsection (1).

The 2006 amendment, by ch. 19, substituted "same retirement" for "full retirement" near the beginning of the second sentence in subsection (1).

**Compiler's Notes.** — This section was formerly compiled as § 72-1429J.

**72-1464. Death benefits — Surviving spouse and children of firefighter dying from causes unconnected with duties but during service after five years.** — (1) In the event a paid firefighter who shall have died from causes unconnected with said firefighter's official duties, but during the period of said firefighter's service, leaves surviving a spouse or a spouse with firefighter's surviving child or children, and who shall have completed less than twenty (20) years, but more than five (5) years of active service as defined in subsection (H) of section 72-1403, Idaho Code, as a paid firefighter, said spouse, during the spouse's lifetime shall be paid from the account a monthly sum equal to: (a) two percent (2%) of the average paid firefighter's salary or wage in this state, if the deceased firefighter was an



Option I firefighter, for each year's active service, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code; or, (b) two percent (2%) of said firefighter's average monthly salary or wage, based on his average final compensation, if the deceased firefighter was an Option II firefighter, for each year's active service, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code. The monthly sum for Option I benefits shall vary annually, according to the determination of the average paid firefighter's salary or wage in this state as set forth in section 72-1431, Idaho Code. If said surviving spouse dies, said monthly sum shall be paid to the firefighter's surviving child or children until they reach the age of eighteen (18) years or shall marry, whichever occurs first; provided, however, that if said deceased firefighter shall have died without leaving a surviving spouse and leaving surviving a child or children, said firefighter's surviving child or children shall be entitled to receive said monthly sum until they shall reach the age of eighteen (18) years or shall marry, whichever occurs first.

(2) In the event a paid firefighter who shall have died from causes unconnected with said firefighter's official duties, but during the period of said firefighter's service, leaves surviving a spouse or a spouse with firefighter's surviving child or children, and who shall have completed less than twenty-five (25) years, but more than twenty (20) years of active service as defined in subsection (H) of section 72-1403, Idaho Code, as a paid firefighter, said spouse, during his or her lifetime shall be paid from the account a monthly sum equal to the sum the firefighter would have received under the provisions of section 72-1435, Idaho Code, had said firefighter retired as of the date of his or her death, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code, and for the purposes of this section, said firefighter shall be deemed to have retired as of the date of death. The monthly retirement sum shall vary annually according to the determination of the cost of living adjustment as set forth in section 72-1471, Idaho Code, and if said spouse dies said monthly sum shall be paid to the firefighter's surviving child or children until they reach the age of eighteen (18) years or shall marry, whichever occurs first, provided, however, that if said deceased firefighter shall have died without leaving a surviving spouse and leaving surviving a child or children, said firefighter's surviving child or children shall be entitled to receive said monthly sum until they reach the age of eighteen (18) years or shall marry, whichever occurs first.

(3) Those benefits payable under the provisions of subsections (1) and (2) of this section which were ordered prior to July 1, 1978, shall continue under the provisions of this chapter in effect at the time such benefit payment was ordered.

(4) Eligibility for benefits of surviving spouses that was terminated on or after July 1, 1987, solely because of the spouse's remarriage is hereby reinstated effective July 1, 1992. Such spouses are entitled to have the benefits, including any cost of living allowances approved by the board effective on or after July 1, 1987, commence prospectively effective July 1,

1992, or upon their application to the retirement system, whichever is later. [I.C., § 72-1429L, as added by 1963, ch. 125, § 15, p. 358; am. 1969, ch. 19, § 1, p. 38; am. 1973, ch. 105, § 6, p. 179; am. 1976, ch. 273, § 10, p. 921; am. 1980, ch. 50, § 27, p. 79; am. 1990, ch. 211, § 3, p. 471; am. 1990, ch. 249, § 15, p. 702; am. and redesign. 1990, ch. 231, § 103, p. 611; am. 1991, ch. 27, § 4, p. 51; am. 1992, ch. 123, § 4, p. 402; am. 2006, ch. 19, § 6, p. 71.]

#### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 19, inserted “less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code” twice in subsection (1) and once in subsection (2).

**Compiler's Notes.** — This section was formerly compiled as § 72-1429L.

**Effective Dates.** — Section 3 of S.L. 1969, ch. 19 declared an emergency. Approved February 13, 1969.

Section 16 of S.L. 1973, ch. 105 provided sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.

**72-1465. Death benefits — Spouse and children of firefighter dying from causes unconnected with duties but during service after twenty-five years.** — (1) In the event a paid firefighter who shall have died from causes unconnected with said firefighter's official duties, but during the period of said firefighter's service, and left surviving a spouse or a spouse with the firefighter's surviving child or children, and who shall have completed twenty-five (25) years' active service as defined in subsection (H) of section 72-1403, Idaho Code, as a paid firefighter, said spouse, during his or her lifetime shall be paid from the account a monthly sum equal to: (a) sixty-five percent (65%) of the average paid firefighter's salary or wage in this state, if the deceased firefighter was an Option I firefighter, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code; or, (b) sixty-five percent (65%) of said firefighter's average monthly salary or wage, based on his average final compensation, if the deceased firefighter was an Option II firefighter, less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code. The monthly sum shall vary annually according to the determination of the cost of living adjustment as set forth in section 72-1471, Idaho Code, and if he or she dies said monthly sum shall be paid to the firefighter's surviving child or children until they shall reach the age of eighteen (18) years or shall marry, whichever occurs first; provided, however, that if said deceased firefighter shall have died without leaving a surviving spouse and leaving a child or children, said firefighter's surviving child or children shall be entitled to receive the pension which said firefighter was entitled until they shall reach the age of eighteen (18) years or shall marry, whichever occurs first.

(2) Those benefits payable under the provisions of subsection (1) which were ordered prior to July 1, 1978, shall continue under the provisions of this chapter in effect at the time such benefit payment was ordered.

(3) Eligibility for benefits of surviving spouses that was terminated on or after July 1, 1987, solely because of the spouse's remarriage is hereby reinstated effective July 1, 1992. Such spouses are entitled to have the



benefits, including any cost of living allowances approved by the board effective on or after July 1, 1987, commence prospectively effective July 1, 1992, or upon their application to the retirement system, whichever is later. [I.C., § 72-1429M, as added by 1963, ch. 125, § 16, p. 358; am. 1973, ch. 105, § 7, p. 179; am. 1976, ch. 273, § 11, p. 921; am. 1980, ch. 50, § 28, p. 79; am. 1990, ch. 211, § 4, p. 471; am. 1990, ch. 249, § 16, p. 702; am. and redesign. 1990, ch. 231, § 104, p. 611; am. 1991, ch. 27, § 5, p. 51; am. 1992, ch. 123, § 5, p. 402; am. 2006, ch. 19, § 7, p. 71.]

### STATUTORY NOTES

**Amendments.** — The 2006 amendment, by ch. 19, inserted “less any portion of the benefit transferred to an alternate payee as provided in sections 59-1319 and 59-1320, Idaho Code” twice in subsection (1).

**Compiler's Notes.** — This section was formerly compiled as § 72-1429M.

**Effective Dates.** — Section 16 of S.L.

1973, ch. 106 provided sections 1-7 and section 15 of the act should take effect on and after January 1, 1974 and sections 8-14 should take effect on and after January 1, 1976.

Section 6 of S.L. 1991, ch. 27 declared an emergency. Approved March 1, 1991.

### 72-1466 — 72-1470. [Reserved.]

**72-1471. Cost of living adjustment.** — In addition to the monthly sums provided for under this chapter, any retired firefighter or his or her surviving spouse, child, or children drawing benefits shall be entitled to receive adjustments to such benefits, calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage, in this state, as computed under the terms of section 72-1431, Idaho Code. [I.C., § 72-1432B, as added by 1976, ch. 273, § 23, p. 921; am. 1978, ch. 331, § 7, p. 851; am. 1980, ch. 50, § 36, p. 79; am. 1990, ch. 211, § 7, p. 471; am. and redesign. 1990, ch. 231, § 105, p. 611.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1432B.

**Effective Dates.** — Section 8 of S.L. 1990,

ch. 211, as amended by S.L. 2006, ch. 253, § 2, declared an emergency. Approved April 3, 1990.

### JUDICIAL DECISIONS

#### Three Percent Limitation.

Actuarial studies could not be admitted into evidence to show that legislative purpose in enacting three percent limitation in 1978 amendment to this section was to maintain the solvency and integrity of the fund since such studies did not come into effect until after the amendment was passed and thus could not constitute evidence of the purpose at the time of passage. *Nash v. Boise City Fire Dep't*, 104 Idaho 803, 663 P.2d 1105 (1983).

Where the rights of fireman-retiree who retired in October, 1978 has vested, since the firemen's fund is not insolvent or unable to

meet its obligations now or in the near future and since the fund's growth period will include the period of the retiree's life expectancy, retirement benefits of retiree should be paid in 1979 and subsequent years calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage without regard to the three percent limitation contained in this section as amended in 1978. *Nash v. Boise City Fire Dep't*, 104 Idaho 803, 663 P.2d 1105 (1983).

**Cited in:** *McNichols v. Public Employee Retirement Sys.*, 114 Idaho 247, 755 P.2d 1285 (1988).

**72-1472. Separability.** — If any clause, section or provision of this chapter be found to be unconstitutional, the remainder of this chapter shall remain in full force and effect, notwithstanding such invalidity. [1945, ch. 76, § 27, p. 112; am. 1980, ch. 50, § 21, p. 79; am. and redesign. 1990, ch. 231, § 106, p. 611.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was formerly compiled as § 72-1426.

### JUDICIAL DECISIONS

#### Application to Amendments.

Where effect of amendment to § 72-1429F (now § 72-1446) by S.L. 1973, ch. 105, § 3 was to diminish the retirement benefits an incapacitated firemen would have received had he retired prior to January 1, 1974, this section applied to sever section 3 from chapter

105 for that section was not indispensable to the purpose of former § 72-1429F. *Lynn v. Kootenai County Fire Protective Dist. #1*, 97 Idaho 623, 550 P.2d 126 (1976).

**Cited in:** *Deonier v. State, Pub. Employee Retirement Bd.*, 114 Idaho 721, 760 P.2d 1137 (1988).

## CHAPTER 15

### COMMISSION FOR REAPPORTIONMENT

#### SECTION.

- 72-1501. Commission for reapportionment.
- 72-1502. Members.
- 72-1503. Political activities prohibited.
- 72-1504. Compensation.

#### SECTION.

- 72-1505. Organization and procedure.
- 72-1506. Criteria governing plans.
- 72-1507. Staff.
- 72-1508. Final report.

**72-1501. Commission for reapportionment.** — (1) A commission for reapportionment shall be organized, upon the order of the secretary of state, in the event that:

- (a) A court of competent jurisdiction orders a redistricting of an existing state legislative or congressional plan; or
- (b) In a year ending in one (1), a new federal census is available, in which case an order shall be issued no earlier than June 1.

(2) A commission formed pursuant to paragraph (1)(b) of this section shall be reconvened if, prior to the next general election, a court of competent jurisdiction orders the plan adopted by that commission to be revised. [I.C., § 72-1501, as added by 1996, ch. 175, § 1, p. 561.]

### JUDICIAL DECISIONS

**Cited in:** *Smith v. Idaho Comm'n on Redistricting*, 136 Idaho 542, 38 P.3d 121 (2001).

**72-1502. Members.** — The president pro tempore of the senate, the speaker of the house of representatives, and the minority leaders of the senate and the house of representatives shall each designate one (1) member of the commission and the state chairmen of the two (2) largest political parties, determined by the vote cast for governor in the last gubernatorial



election, shall each designate one (1) member of the commission. Appointing authorities should give consideration to achieving geographic representation in appointments to the commission. If an appointing authority does not select the members within fifteen (15) calendar days following the secretary of state's order to form the commission, such members shall be appointed by the supreme court.

Should a vacancy on the commission occur during the tenure of a commission, the secretary of state shall issue an order officially recognizing such vacancy. The vacancy shall be filled by the original appointing authority within fifteen (15) days of the order. Should the original appointing authority fail to make the appointment within fifteen (15) days, the vacancy shall be filled by the supreme court.

No person may serve on the commission who:

- (1) Is not a registered voter of the state at the time of selection; or
- (2) Is or has been within one (1) year a registered lobbyist; or
- (3) Is or has been within two (2) years prior to selection an elected official or elected legislative district, county or state party officer. The provisions of this subsection do not apply to the office of precinct committeeperson.

A person who has served on a commission for reapportionment shall be precluded from serving in either house of the legislature for five (5) years following such service on the commission. [I.C., § 72-1502, as added by 1996, ch. 175, § 1, p. 561.]

#### JUDICIAL DECISIONS

##### **Lobbyist.**

This section only prohibits registered lobbyists from serving on the Idaho commission for redistricting for one year from the time that he or she was a registered lobbyist. *Smith v.*

*Idaho Comm'n on Redistricting*, 136 Idaho 542, 38 P.3d 121 (2001).

**Cited in:** *Troutner v. Kempthorne*, — Idaho —, 128 P.3d 926 (2006).

**72-1503. Political activities prohibited.** — No person may serve on the commission who is a candidate for political office as the term "candidate" is defined in section 67-6602, Idaho Code. In the event a person serving on the commission becomes a candidate, a vacancy on the commission shall be declared by the secretary of state, and filled as provided by law. [I.C., § 72-1503, as added by 1996, ch. 175, § 1, p. 561.]

**72-1504. Compensation.** — Members of the commission shall be compensated at the rate established by the citizen's committee on compensation for members of the legislature who are engaged in legislative business while the legislature is not in session. In addition, they shall be entitled to expense reimbursement for actual travel expense, including transportation, food and lodging, when necessary for officially authorized commission business at the same rate as expense reimbursements are made for other state offices and employees. [I.C., § 72-1504, as added by 1996, ch. 175, § 1, p. 561.]

**72-1505. Organization and procedure.** — The commissioners shall elect, by majority vote, a member or members to serve as chairman or

cochairmen and other officers as they may determine.

All proceedings of the commission shall be governed by the following procedure:

(1) All meetings of the commission shall be subject to the provisions of the open meeting law.

(2) The commission shall provide notice of all meetings to any citizen or organization requesting the same.

(3) Copies of the validated census database, and all other databases available to the commission, will be provided in a form, as determined by the commission, to any person at cost.

(4) The commission shall hold meetings in different locations in the state in order to maximize the opportunity for public participation.

(5) A quorum of the commission shall consist of four (4) members. In the event there is a previously scheduled meeting, less than a quorum may take testimony and information, but no votes other than to set a future agenda, to prepare for future meetings, and to adjourn or recess, may be taken. Any final action of the commission shall be by a vote of two-thirds ( $\frac{2}{3}$ ) of the full membership of the commission.

(6) A member must be present to vote.

(7) A redistricting plan may be presented to the commission by an individual citizen or organization. All such plans shall be public information. Any citizen or organization shall provide a current mailing address and telephone number to accompany any plan submitted. [I.C., § 72-1505, as added by 1996, ch. 175, § 1, p. 561.]

**72-1506. Criteria governing plans.** — Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission, shall be governed by the following criteria:

(1) The total state population as reported by the U.S. census bureau, and the population of subunits determined therefrom, shall be exclusive permissible data.

(2) To the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest.

(3) Districts shall be substantially equal in population and should seek to comply with all applicable federal standards and statutes.

(4) To the maximum extent possible, the plan should avoid drawing districts that are oddly shaped.

(5) Division of counties should be avoided whenever possible. Counties should be divided into districts not wholly contained within that county only to the extent reasonably necessary to meet the requirements of the equal population principle. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum.

(6) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties.

(7) District boundaries should retain, as far as practicable, the local voting precinct boundary lines to the extent those lines comply with the provisions of section 34-306, Idaho Code.



(8) Counties shall not be divided to protect a particular political party or a particular incumbent. [I.C., § 72-1506, as added by 1996, ch. 175, § 1, p. 561.]

### JUDICIAL DECISIONS

#### Community of Interest.

Reapportionment under which the total maximum population deviation was 9.71% was presumptively constitutional, and challenges of plan failed to demonstrate that the deviation resulted from any unconstitutional or irrational state purpose which would over-

come this presumption. Idaho Legislative Reapportionment Plan of 2002 v. Ysursa, — Idaho —, 129 P.3d 1213 (2005).

**Cited in:** Bingham County v. Idaho Comm'n for Reapportionment, 137 Idaho 870, 55 P.3d 863 (2002).

**72-1507. Staff.** — The legislative council is directed to furnish such secretarial and other staff assistance as the commission may require in the performance of its duties. The council shall prepare and submit a budget for the expenses of the commission, including staff, equipment, meetings, salary and expense reimbursement of members, for consideration by the legislature not later than the session held in a year ending in nine (9) preceding the convening of a commission. [I.C., § 72-1507, as added by 1996, ch. 175, § 1, p. 561.]

**72-1508. Final report.** — The final report of the commission shall be filed with the office of the secretary of state not more than ninety (90) days after the commission has been organized. At the next regular or special session of the legislature, the secretary of state shall transmit a copy of the report to the president of the senate and the speaker of the house, which shall be spread upon the journals. [I.C., § 72-1508, as added by 1996, ch. 175, § 1, p. 561.]

## CHAPTER 16

### STATE DIRECTORY OF NEW HIRES

#### SECTION.

72-1601. Short title.

72-1602. Purpose.

72-1603. Definitions.

72-1604. Employer reporting requirements.

#### SECTION.

72-1605. Use of new hire information.

72-1606. Costs.

72-1607. Rules.

**72-1601. Short title.** — This chapter shall be known and may be cited as the “Directory of New Hires Act.” [I.C., § 72-1601, as added by 1997, ch. 340, § 1, p. 1016.]

**72-1602. Purpose.** — This chapter establishes an automated state directory of new hires to be administered by the department of labor for the purpose of securing for this state the maximum benefits of the act of congress, approved August 22, 1996, known as the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996.” The state directory of new hires provides a means for employers to assist in the state’s efforts to prevent fraud in the welfare, worker’s compensation, and unemployment

insurance programs, to locate individuals to establish paternity, to locate absent parents who owe child support, and to collect support from those parents by reporting information concerning newly hired and rehired employees directly to a centralized state database. [I.C., § 72-1602, as added by 1997, ch. 340, § 1, p. 1016.]

#### STATUTORY NOTES

**Federal References.** — The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PL 104-193) referred to in this section is compiled throughout titles 7, 8, 26, and 42 of the U.S.C.

**72-1603. Definitions.** — As used in this chapter:

(1) “Date of hire” or “date of rehire” means the actual commencement of employment of an employee for wages or other remuneration.

(2) “Department” means the Idaho department of labor.

(3) “Director” means the director of the Idaho department of labor.

(4) “Employee” means an individual who is an employee within the meaning of 26 U.S.C. 3401. “Employee” does not include an employee of a federal or state agency performing intelligence or counterintelligence functions, if the head of such agency has determined that reporting information with respect to the employee pursuant to this chapter could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.

(5) “Employer” has the meaning given such term in 26 U.S.C. 3401(d) and includes labor organizations and governmental entities, except for any department, agency or instrumentality of the United States. The term “employer” does not include a multistate employer who has notified the United States secretary of health and human services in writing that it will transmit new hire reports magnetically or electronically to a state other than Idaho.

(6) “Labor organization” shall have the meaning given such term in 29 U.S.C. 152(5), and includes any entity (also known as a “hiring hall”) which is used by the organization and an employer to carry out requirements described in 29 U.S.C. 158(f)(3) or an agreement between the organization and the employer.

(7) “Rehire” means to re-employ an individual who was laid off, separated, furloughed, granted leave without pay or terminated from employment at least twelve (12) months prior to re-employment. [I.C., § 72-1603, as added by 1997, ch. 340, § 1, p. 1016.]

**72-1604. Employer reporting requirements.** — (1) Effective October 1, 1997, an employer doing business in the state of Idaho shall report to the department the hiring or rehiring of an employee who works in the state. The report shall contain:

(a) The employee’s name, address and social security number;

(b) The employer’s name, address and the identifying number assigned to the employer under 26 U.S.C. 6109; and

(c) The employer’s Idaho unemployment insurance account number, if any, and the employee’s date of hire or rehire.



(d) Multistate employers that have notified the secretary of health and human services that they will transmit all new hire reports to Idaho shall indicate in the reports whether each employee will be included in the employer's Idaho quarterly wage report for unemployment insurance purposes.

(2) An employer may report by submitting a copy of the employee's United States internal revenue service form W-4 (employee's withholding allowance certificate) with the information required in subsections (1)(c) and (d) of this section (if applicable) noted thereon, or by any other means authorized by the director. An employer may submit the report by mail, telefax, or any other means the director authorizes. If an employer submits a report by mail, the report shall be deemed submitted on the postmarked date. A report transmitted by any other means shall be deemed submitted on the date the department receives it.

(3) An employer shall submit its report not later than twenty (20) calendar days after the date of hire or rehire. Employers transmitting reports electronically shall submit two (2) transmissions each month, if necessary, not less than twelve (12) days nor more than sixteen (16) days apart.

(4) An employer is authorized and required by this chapter to disclose the information described in subsection (1) of this section and is not liable to the employee for the disclosure or subsequent use of the information pursuant to this chapter.

(5) Entry of employer information shall be made into a database maintained by the state directory of hires within five (5) business days of receipt from employers. [I.C., § 72-1604, as added by 1997, ch. 340, § 1, p. 1016.]

**72-1605. Use of new hire information.** — (1) The information collected pursuant to this chapter shall be used only for the following purposes:

(a) The department of health and welfare shall use the information to assist in its administration of any public assistance program and for child support enforcement purposes.

(b) The department of labor shall transmit the information to the national directory of new hires and may use the information to administer programs under the employment security law and may provide the information to the state tax commission for the proper administration of income tax withholding under the Idaho income tax act.

(c) The state insurance fund and the industrial commission may use the information to administer the worker's compensation program.

(2) Agencies that obtain information collected pursuant to this chapter shall maintain the confidentiality of the information received, except as provided in this chapter. If any employee or agent of the state, in violation of the provisions of this chapter, discloses information collected pursuant to this chapter, he or she shall be guilty of a misdemeanor. [I.C., § 72-1605, as added by 1997, ch. 340, § 1, p. 1016; am. 1998, ch. 230, § 6, p. 782.]

## STATUTORY NOTES

**Legislative Intent.** — Section 1 of S.L. 1998, ch. 230 provides: "STATEMENT OF LEGISLATIVE INTENT. It is the purpose of this act [which, in part, amended this section] to reduce tax compliance burdens of employers and to permit the department of labor and the state tax commission to make the most efficient use of their powers and resources by enabling the department and the commission

to cooperate in matters relating to employment security taxes and income tax withholding through common registration of employers, common tax reporting forms, centralized filing of returns and receipting of revenue and effective exchange of information."

**Effective Dates.** — Section 7 of S.L. 1998, ch. 230 provided this act shall be in full force and effect on and after January 1, 1999.

**72-1606. Costs.** — By written agreement, the department of health and welfare shall agree to pay the department of labor all costs incurred by the department of labor under this chapter that are attributable to the department of health and welfare, including the cost of establishing and maintaining the state directory of new hires. In the absence of such an agreement, the department of labor shall have no obligations or duties under this chapter except in its capacity as an employer that is required to report new hires. An agency that obtains information pursuant to subsection (1)(c) of section 72-1605, Idaho Code, shall reimburse the department for any costs it incurs to provide the information. [I.C., § 72-1606, as added by 1997, ch. 340, § 1, p. 1016.]

**72-1607. Rules.** — The director may promulgate rules to administer this chapter, pursuant to chapter 52, title 67, Idaho Code. [I.C., § 72-1607, as added by 1997, ch. 340, § 1, p. 1016.]

## CHAPTER 17

## IDAHO EMPLOYER ALCOHOL AND DRUG-FREE WORKPLACE ACT

## SECTION.

- 72-1701. Purpose and intent of act.
- 72-1702. Testing for drugs and/or alcohol.
- 72-1703. Cost of testing of current employees.
- 72-1704. Requirements for sample collection and testing.
- 72-1705. Employer's written testing policy — Purposes and requirements for collection and testing.
- 72-1706. Right of employee or prospective employee to explain positive test result and request for re-test.
- 72-1707. Discharge for work-related misconduct — Failure or refusal of testing.
- 72-1708. Employer's disciplinary or rehabilitative actions based on testing

## SECTION.

- Claimant ineligible for benefits.
- 72-1709. Failure of claimant to accept suitable work.
- 72-1710. Limitations of employer liability.
- 72-1711. False test result — Presumption and limitation of damages in claim against employer.
- 72-1712. Confidentiality of information.
- 72-1713. Employee not "disabled."
- 72-1714. No physician-patient relationship created.
- 72-1715. Public entities may conduct programs.
- 72-1716. Implementation of alcohol and drug-free workplace program — Qualification of employer premium reduction.
- 72-1717. State construction contracts.

**72-1701. Purpose and intent of act.** — (1) The purpose of this act is to promote alcohol and drug-free workplaces and otherwise support employers in their efforts to eliminate substance abuse in the workplace, and thereby enhance workplace safety and increase productivity. This act



establishes voluntary drug and alcohol testing guidelines for employers that, when complied with, will find an employee who tests positive for drugs or alcohol at fault, and will constitute misconduct under the employment security law as provided in section 72-1366, Idaho Code, thus resulting in the denial of unemployment benefits.

(2) It is the further purpose of this act to promote alcohol and drug-free workplaces in order that employers in this state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace and reach their desired levels of success without experiencing the cost delays and tragedies associated with work-related accidents resulting from substance abuse by employees. [I.C., § 72-1701, as added by 1997, ch. 126, § 1, p. 375; am. 1998, ch. 1, § 105, p. 3; am. 1999, ch. 142, § 1, p. 406; am. 2003, ch. 233, § 2, p. 592.]

### JUDICIAL DECISIONS

#### **Presumption.**

Although the employer, who discharged a worker for failing to pass a drug test, had not complied with the Idaho Private Employer Alcohol and Drug-Free Workplace Act, § 72-1701 et seq., this simply meant the employer

was not entitled to the benefit of a presumption; however, the employer still showed that the worker, by smoking marijuana off the job, engaged in misconduct in connection with his employment. *Desilet v. Glass Doctor*, — Idaho —, 132 P.3d 412 (2006).

**72-1702. Testing for drugs and/or alcohol.** — (1) It is lawful for a private employer to test employees or prospective employees for the presence of drugs or alcohol as a condition of hiring or continued employment, provided the testing requirements and procedures are in compliance with 42 U.S.C. section 12101.

(2) Nothing herein prohibits an employer from using the results of a drug or alcohol test conducted by a third party including, but not limited to, law enforcement agencies, hospitals, etc., as the basis for determining whether an employee has committed misconduct.

(3) This act does not change the at-will status of any employee. [I.C., § 72-1702, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 3, p. 592.]

**72-1703. Cost of testing of current employees.** — (1) Any drug or alcohol testing by an employer of current employees shall be deemed work time for purposes of compensation.

(2) All costs of drug and alcohol testing for current employees conducted under the provisions of this act, unless otherwise specified in section 72-1706(2), Idaho Code, shall be paid by the employer. [I.C., § 72-1703, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 4, p. 592.]

### STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1997, ch. 126 which is compiled as §§ 72-1701 — 72-1715.

**72-1704. Requirements for sample collection and testing.** — All sample collection and testing for drugs and alcohol under this act shall be performed in accordance with the following conditions:

(1) The collection of samples shall be performed under reasonable and sanitary conditions;

(2) The employer or employer's agent who is responsible for collecting the sample will be instructed as to the proper methods of collection;

(3) Samples shall be collected and tested with due regard to the privacy of the individual being tested and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(4) Sample collection shall be documented and the documentation procedures shall include:

(a) Labeling of samples so as reasonably to preclude the possibility of misidentification of the person tested in relation to the test result provided; and

(b) Handling of samples in accordance with reasonable chain-of-custody and confidentiality procedures;

(5) Sample collection, storage and transportation to the place of testing shall be performed so as reasonably to preclude the possibility of sample contamination and/or adulteration;

(6) Sample testing shall conform to scientifically accepted analytical methods and procedures;

(7) Drug testing shall include a confirmatory test before the result of any test can be used as a basis for action by an employer under sections 72-1707 and 72-1708, Idaho Code. A confirmatory test refers to the mandatory second or additional test of the same sample that is conducted by a laboratory utilizing a chromatographic technique such as gas chromatography-mass spectrometry or another comparable reliable analytical method;

(8) Positive alcohol tests resulting from the use of an initial screen saliva test, must include a confirmatory test that utilizes a different testing methodology meant to demonstrate a higher degree of reliability;

(9) Positive alcohol tests resulting from the use of a breath test must include a confirmatory breath test conducted no earlier than fifteen (15) minutes after the initial test; or the use of any other confirmatory test meant to demonstrate a higher degree of reliability. [I.C., § 72-1704, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 5, p. 592.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act," see compiler's notes, § 72-1703.

#### RESEARCH REFERENCES

**A.L.R.** — Authentication of organic nonblood specimen taken from human body for purposes of analysis. 78 A.L.R.5th 1.



**72-1705. Employer's written testing policy — Purposes and requirements for collection and testing.** — (1) An employer must have a written policy on drug and/or alcohol testing that is consistent with the requirements of this act, including a statement that violation of the policy may result in termination due to misconduct.

(2) An employer will receive the full benefits of this act, even if its drug and alcohol testing policy does not conform to all of the statutory provisions, if it follows a drug or alcohol testing policy that was negotiated with its employees' collective bargaining representative or that is consistent with the terms of the collective bargaining agreement.

(3) Testing for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy that has been communicated to affected employees, and is available for review by prospective employees.

(4) The employer must list the types of tests an employee may be subject to in their written policy, which may include, but are not limited to, the following:

- (a) Baseline;
- (b) Preemployment;
- (c) Post-accident;
- (d) Random;
- (e) Return to duty;
- (f) Follow-up;
- (g) Reasonable suspicion. [I.C., § 72-1705, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 6, p. 592.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act," see compiler's notes, § 72-1703.

**72-1706. Right of employee or prospective employee to explain positive test result and request for retest.** — (1) Any employee or prospective employee who tests positive for drugs or alcohol must be given written notice of that test result, including the type of substance involved, by the employer. The employee must be given an opportunity to discuss and explain the positive test result with a medical review officer or other qualified person.

(2) Any employee or prospective employee who has a positive test result may request that the same sample be retested by a mutually agreed upon laboratory. A request for retest must be done within seven (7) working days from the date of the first confirmed positive test notification and may be paid for by the employee or prospective employee requesting the test. If the retest results in a negative test outcome, the employer will reimburse the cost of the retest, compensate the employee for his time if suspended without pay, or if terminated solely because of the positive test, the employee shall be reinstated with back pay. [I.C., § 72-1706, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 7, p. 592.]

**72-1707. Discharge for work-related misconduct — Failure or refusal of testing.** — An employer establishes that an employee was discharged for work-related misconduct, as provided in section 72-1366, Idaho Code, upon a showing that the employer has complied with the requirements of this chapter and that the discharge was based on:

(1) A confirmed positive drug test or a positive alcohol test, as indicated by a test result of not less than .02 blood alcohol content (BAC), but greater than the level specified in the employer's substance abuse policy;

(2) The employee's refusal to provide a sample for testing; or

(3) The employee's alteration or attempt to alter a test sample by adding a foreign substance for the purpose of making the sample more difficult to analyze; or

(4) The employee's submission of a sample that is not his or her own. [I.C., § 72-1707, as added by 1997, ch. 126, § 1, p. 375; am. 1998, ch. 1, § 106, p. 3; am. 2003, ch. 233, § 8, p. 592.]

**72-1708. Employer's disciplinary or rehabilitative actions based on testing — Claimant ineligible for benefits.** — (1) Unless otherwise prohibited, upon receipt of a confirmed positive drug or alcohol test result or other proof which indicates a violation of an employer's written policy, or upon the refusal of an employee to provide a test sample, or upon an employee's alteration of or attempt to alter a test sample, an employer may use that test result or the employee's conduct as the basis for disciplinary or refusal-to-hire action that will result in a claimant's ineligibility to receive benefits under the provisions of section 72-1366(4), (5), (6) or (7), Idaho Code. Actions by the employer may include, but are not limited to, the following:

(a) A requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;

(b) Suspension of the employee with or without pay for a period of time;

(c) Termination of the employee;

(d) Other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

(2) Action taken pursuant to this section shall not create any cause of action against the employer. [I.C., § 72-1708, as added by 1997, ch. 126, § 1, p. 375; am. 1998, ch. 1, § 107, p. 3; am. 2003, ch. 233, § 9, p. 592.]

**72-1709. Failure of claimant to accept suitable work.** — If a claimant for unemployment benefits does not accept otherwise suitable work, as contemplated in section 72-1366(4), (6) or (7), Idaho Code, because he is required to take a preemployment drug or alcohol test, the claimant has failed to accept suitable work, unless the claimant is required to pay for costs associated with a negative drug or alcohol test result. [I.C., § 72-1709, as added by 1997, ch. 126, § 1, p. 375; am. 1998, ch. 1, § 108, p. 3.]

**72-1710. Limitations of employer liability.** — (1) No cause of action arises in favor of any person based upon the absence of an employer



established program or policy of drug or alcohol testing in accordance with this chapter.

(2) No cause of action arises in favor of any person against an employer for any of the following:

- (a) Failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;
- (b) Failure to test for, or if tested, a failure to detect, any specific drug or other physical abnormality, problem or defect of any kind; or
- (c) Termination or suspension of any drug or alcohol testing program or policy. [I.C., § 72-1710, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 10, p. 592.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words “this act,”  
see compiler's notes, § 72-1703.

**72-1711. False test result — Presumption and limitation of damages in claim against employer.** — (1) No cause of action arises in favor of any person against an employer who has established a program of drug and alcohol testing in accordance with this chapter, and who has taken any action based on its established substance abuse and/or disciplinary policies, unless the employer's action was based on a false test result, and the employer knew or clearly should have known that the result was in error.

(2) In any claim where it is alleged that an employer's action was based on a false test result:

- (a) There is a rebuttable presumption that the test result was valid if the employer complied with the provisions of section 72-1704, Idaho Code;
- (b) The employer is not liable for monetary damages if his reliance on a false test result was reasonable and in good faith; and
- (c) There is no employer liability for any action taken related to a “false negative” drug or alcohol test. [I.C., § 72-1711, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 11, p. 592.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words “this act,”  
see compiler's notes, § 72-1703.

**72-1712. Confidentiality of information.** — (1) All information, interviews, reports, statements, memoranda or test results, written or otherwise, received through a substance abuse testing program shall be kept confidential, and are intended to be used only for an employer's internal business use; or in a proceeding related to any action taken by or against an employer under section 72-1707, 72-1708 or 72-1711, Idaho Code, or other dispute between the employer and the employee or applicant; or as required to be disclosed by the United States department of transportation law or regulation or other federal law; or as required by service of legal process.

(2) The information described in subsection (1) of this section shall be the property of the employer.

(3) An employer, laboratory, medical review officer, employee assistance program, drug or alcohol rehabilitation program and their agents, who receive or have access to information concerning test results shall keep the information confidential, except as provided in subsection (4) of this section.

(4) Nothing in this chapter prohibits an employer from using information concerning an employee or job applicant's substance abuse test results in a lawful manner with respect to that employee or applicant as provided in chapter 2, title 44, Idaho Code. [I.C., § 72-1712, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 12, p. 592.]

**72-1713. Employee not “disabled.”** — An employee or prospective employee whose drug or alcohol test results are verified or confirmed as positive in accordance with the provisions of this act shall not, by virtue of those results alone, be defined as a person with a “disability” for purposes of chapter 59, title 67, Idaho Code. [I.C., § 72-1713, as added by 1997, ch. 126, § 1, p. 375.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words “this act,” see compiler's notes, § 72-1703.

**72-1714. No physician-patient relationship created.** — A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing a drug or alcohol test, solely by the establishment of a drug or alcohol testing program in the workplace. [I.C., § 72-1714, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 13, p. 592.]

**72-1715. Public entities may conduct programs.** — The state of Idaho and any political subdivision thereof may conduct drug and alcohol testing of employees under the provisions of this chapter and as otherwise constitutionally permitted. [I.C., § 72-1715, as added by 1997, ch. 126, § 1, p. 375; am. 2003, ch. 233, § 14, p. 592.]

**72-1716. Implementation of alcohol and drug-free workplace program — Qualification of employer premium reduction.** — (1) For each policy of worker's compensation insurance issued or renewed in the state on or after July 1, 1999, a reduction in the premium for the policy may be granted if the insurer determines the insured has established and maintains an alcohol and drug-free workplace program that complies with the requirements of sections 72-1701 through 72-1715, Idaho Code.

(2) The state of Idaho or any political subdivision thereof that conducts drug and alcohol testing of all those employees and prospective employees for whom such testing is not constitutionally prohibited shall qualify for, and may be granted, the employer premium reduction set forth in subsection (1) of this section. [I.C., § 72-1716, as added by 1999, ch. 142, § 2, p. 406; am. 2003, ch. 233, § 15, p. 592.]



**72-1717. State construction contracts.** — (1) In order to be eligible for the award of any state contract for the construction or improvement of any public property or publicly owned buildings, contractors shall meet the following requirements:

(a) Provide a drug-free workplace program that complies with the provisions of this chapter and as otherwise constitutionally permitted for employees, including temporary employees, and maintain such program throughout the duration of the contract;

(b) Subcontract work under state construction contracts only to those subcontractors meeting the requirements of subsection (1)(a) of this section.

(2) Any contractor submitting a bid for a state construction contract, required to comply with the provisions of this section, shall submit an affidavit along with its bid on the project verifying its compliance with the provisions of this section. [I.C., § 72-1717, as added by 2004, ch. 224, § 1, p. 666.]

#### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 2004, ch. 224 provided that the act should take effect on and after January 1, 2005.





## TITLE 73

### GENERAL CODE PROVISIONS

#### CHAPTER

1. CONSTRUCTION OF STATUTES, §§ 73-101 — 73-122.
2. IDAHO CODE COMMISSION, §§ 73-201 — 73-221.

#### CHAPTER

3. CONSTRUCTION OF FORMULA CLAUSES, § 73-301.
4. FREE EXERCISE OF RELIGION PROTECTED, §§ 73-401 — 73-404.

## CHAPTER 1

### CONSTRUCTION OF STATUTES

#### SECTION.

- 73-101. Codes not retroactive.
- 73-102. Codes liberally construed — Multiple amendments to be compiled.
- 73-103. Codes continue existing law.
- 73-104. Tenure of offices preserved.
- 73-105. Certain offices to cease.
- 73-106. Accrued rights and pending actions not affected.
- 73-107. Limitations not tolled.
- 73-108. Holidays enumerated.
- 73-108A. Children's day.
- 73-108B. Constitutional commemorative day.
- 73-109. Computation of time.

#### SECTION.

- 73-110. Computation of time — Obligations maturing on holidays.
- 73-111. Seal defined.
- 73-112. Joint authority construed.
- 73-113. Construction of words and phrases.
- 73-114. Statutory terms defined.
- 73-115. General repeal of existing law.
- 73-116. Common law in force.
- 73-117. Prior legislation repealed.
- 73-118. Past offenses may be prosecuted.
- 73-119. Special and local laws continued.
- 73-120. Special and local laws of 1919.
- 73-121. Certain documents to be in English.
- 73-122. Social security number.

**73-101. Codes not retroactive.** — No part of these compiled laws is retroactive, unless expressly so declared. [C.C.P. 1881, § 2; R.S., § 3; reen. R.C., § 3; reen. C.L. 500:3; C.S., § 9443; I.C.A., § 70-101.]

### STATUTORY NOTES

**Compiler's Notes.** — The first section of this title in Compiled Laws declared an emergency in the enactment of that code. The enactment of Compiled Laws was approved January 25, 1919.

The following note is taken from Compiled Statutes of Idaho: "Part V of Compiled Laws, entitled as above, 'General Code Provisions,'

is not applicable to Compiled Statutes as a code, since no formal enactment of Compiled Statutes as such has been made. It is inserted in this compilation as referring only to Compiled Laws but an additional section (§ 73-120) has been added to embrace the local and special laws enacted at the 1919 session."

### JUDICIAL DECISIONS

#### ANALYSIS

- Accrual of right before amendment effective.
- Amendment during litigation.
- Attorney fees.
- Construction of statutes.
- Express declaration of retroactivity.
- Intention.
- Statute of limitations.
- When validity dependent on nonretroactive effect.

### **Accrual of Right Before Amendment Effective.**

When a statutory period of limitation is amended to reduce the limitation period, a party whose right accrues before the effective date of the amendment cannot be heard to complain if he is given the full time for action according to the terms of the amended statute from and after the effective date of the amended statute; thus, where the 1976 amendment to § 31-3504 reduced the time period for applying for medically indigent benefits from within one year of discharge from the hospital to within 45 days following admission to the hospital, and the indigent applicant who had received medical treatment through February, 1976, was given 45 days from the effective date of the 1976 amendment, July 1, 1976, in which to file an application, the trial court did not err in holding that the plaintiff's application filed in November of 1976 was untimely. *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982).

### **Amendment During Litigation.**

A city's exercise of the right of eminent domain to condemn the property of an electrical power co-operative within newly annexed territory was governed by the statute in force at the time it filed its answer and counterclaim and not one which became effective subsequently to such filing, but prior to trial of the cause. *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 445 P.2d 720 (1968).

Where subsequent to district court's decision in child custody case, the legislature recodified and substantially modified the applicable statute, the former version of the statute controls the disposition of the case under this section. *Overman v. Overman*, 102 Idaho 235, 629 P.2d 127 (1980).

### **Attorney Fees.**

Statutes authorizing discretionary awards of attorney fees generally are held to be remedial or procedural; consequently, they are given retroactive effect. *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988).

In suit by architects against State Building Authority for breach of contract that provided for architectural and certain other services, § 12-120(3) clearly could be applied to award attorney fees against the Authority because such action involved a contract for services as well as a commercial transaction; further, the fact that the provisions of § 12-120(3) regarding contracts relating to services were not added to the section until its 1986 amendment and the definition of party did not include the state of political subdivisions thereof until the 1987 amendment of the section, did not prohibit application of such section, since the suit was filed after the passage of either of these amendments, as the

proper function is upon the time of the filing, not the time the cause of action arose. *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 835 P.2d 1282 (1992).

### **Construction of Statutes.**

The construction given a statute by the executive and administrative officers of the state is entitled to great weight and will be followed unless there are cogent reasons for a change. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

In the absence of an express declaration of legislative intent that a statute apply retroactively, it will not be so applied; however, a statute, which is remedial or procedural in nature, and which does not create, enlarge, diminish, or destroy contractual or vested rights, is generally held not to be a retroactive statute, even though it was enacted subsequent to the events to which it applies. *Gayley v. Jerome County*, 113 Idaho 430, 745 P.2d 1051 (1987).

Statutes which do not create, enlarge, diminish or destroy contractual or vested rights are deemed to be remedial or procedural, as opposed to substantive, and they may be applied retrospectively. *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988).

An application of law is deemed retrospective if it affects substantive rights. *Myers v. Vermaas*, 114 Idaho 85, 753 P.2d 296 (Ct. App. 1988).

Notwithstanding that direct appeal was fully conducted and final in 1985, the District Court relied upon the 1986 amendment to § 19-4901 in ruling that defendant had waived most of the issues raised in his petition. This was error. This section clearly prohibits the retroactive application of newly passed legislation. As is readily apparent from the text of § 19-4901, there is not even a hint of legislative intent that § 19-4901 could be retroactively applied. *Matthews v. State*, 122 Idaho 801, 839 P.2d 1215 (1992).

Paternity action against defendant determined to be father of child was not barred by the statute of limitations as the 1986 amendments to § 7-1107 clearly expressed the legislature's intention that the statute of limitations not run on a cause of action for any child born before or after the effective dates of the amendment. *Henderson v. Smith*, 128 Idaho 444, 915 P.2d 6 (1996).

### **Express Declaration of Retroactivity.**

The 1974 legislative amendment to subsection 1. of § 5-218 is not retroactive in its application to January 1974 since a statute is not retroactive under this section unless expressly so declared, and the only express declaration of retroactivity in this amendment is to causes of action discovered within three years prior to its passage, on April 3, 1974. *Lincoln County v. Fidelity & Deposit*



Co., 102 Idaho 489, 632 P.2d 678 (1981).

There is general agreement in the case law of this jurisdiction that there must be a clear expression of legislative intent of retroactivity before a statute will be given such effect. *University of Utah Hosp. ex rel. Harris v. Pence*, 104 Idaho 172, 657 P.2d 469 (1982).

Generally a statute will not be applied retroactively in the absence of clear legislative intent to that effect. However, retroactive legislation is only that which affects vested or already existing rights. *City of Garden City v. City of Boise*, 104 Idaho 512, 660 P.2d 1355 (1983).

#### Intention.

If the language clearly refers to the past as well as to the future, then the intent to make law retroactive is expressly declared within the meaning of this section. Express words "this statute is to be deemed retroactive" are not necessary. *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914). See also *Cook v. Massey*, 38 Idaho 264, 220 P. 1088 (1923); *Nampa & Meridian Irrigation Dist. v. Barker*, 38 Idaho 529, 223 P. 529 (1924); *State v. Cleland*, 42 Idaho 803, 248 P. 831 (1926).

Unless the legislature in its enactments uses expressions clearly indicative of the intent that the statute be given retrospective effect, it will not be so construed. *In re Pahlke*, 56 Idaho 338, 53 P.2d 1177 (1936).

Retroactive application of a statute is not allowed unless there is clear legislative intent to that effect; the language of the Idaho Competition Act indicates that it does not apply retroactively to permit the recovery of damages based upon conduct that occurred before its effective date. *State v. Daicel Chem.*

*Indus., Ltd.*, 141 Idaho 102, 106 P.3d 428 (2005).

#### Statute of Limitations.

This section does not preclude the legislature from amending the statute of limitations applicable to a given individual after the individual has committed a crime, but prior to the running of the statute of limitations in existence at the time of the commission of the crime. *State v. O'Neill*, 118 Idaho 244, 796 P.2d 121 (1990).

#### When Validity Dependent on Non-retroactive Effect.

General rule that all statutes are to be so construed, if possible, as to be valid, requires that the statute shall never be given a retrospective operation, when to do so would render it unconstitutional, and words of statute admit of any other construction. *Lawrence v. Defenbach*, 23 Idaho 78, 128 P. 81 (1912).

**Cited in:** *Meholin v. Carlson*, 17 Idaho 742, 107 P. 755 (1910); *Ferguson v. Sullivan*, 58 Idaho 428, 74 P.2d 183 (1937); *Winans v. Swisher*, 68 Idaho 364, 195 P.2d 357 (1948); *Edwards v. Walker*, 95 Idaho 289, 507 P.2d 486 (1973); *Blankenship v. Myers*, 97 Idaho 356, 544 P.2d 314 (1975); *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979); *Baker v. Baker*, 100 Idaho 635, 603 P.2d 590 (1979); *Porter v. Farmers Ins. Co.*, 102 Idaho 132, 627 P.2d 311 (1981); *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 636 P.2d 745 (1981); *Mellinger v. State*, 113 Idaho 31, 740 P.2d 73 (Ct. App. 1987); *Frazier v. Neilsen & Co.*, 118 Idaho 104, 794 P.2d 1160 (Ct. App. 1990); *Paradis v. State*, 128 Idaho 223, 912 P.2d 110 (1996).

### RESEARCH REFERENCES

**Am. Jur.** — 16A Am. Jur. 2d, Constitutional Law, § 179.

**C.J.S.** — 82 C.J.S., Statutes, § 407 et seq.

**73-102. Codes liberally construed — Multiple amendments to be compiled.** — (1) The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to these compiled laws. The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice.

(2) If multiple amendments to a single section of the Idaho Code have been or are made during a legislative session, and if the amendments can be read into the section without conflict, such amendments shall all be effective and shall be compiled as if made by a single enactment. [C.C.P. 1881, § 3; R.S., § 4; reen. R.C., § 4; reen. C.L. 500:4; C.S., § 9444; reen. 1899, ch. 5, § 2, p. 147; reen. R.C., § 5150; reen. C.L. 500:4; I.C.A., § 70-102; am. 1978, ch. 325, § 1, p. 820.]

## JUDICIAL DECISIONS

## ANALYSIS

Application to particular statutes.  
 Common-law rule changed.  
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 — Alternate constructions.  
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 — Clerical and typographical errors.  
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 — Conflicting acts.  
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 — Legislative intent.  
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 — Statutes construed together.  
 — Statutes in *pari materia*.  
 — Statutory construction given by officials.  
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 — Title of act.  
 — Words and phrases.  
 Penal statutes.

**Application to Particular Statutes.**

Appeal. *First Nat'l Bank v. C. Bunting & Co.*, 7 Idaho 387, 63 P. 694 (1900).

Attachment. *Glidden v. Whittier*, 46 F. 437 (C.C.D. Idaho 1891); *Simmons Hdwe. Co. v. Alturas Com. Co.*, 4 Idaho 334, 39 P. 550 (1895); *Vollmer v. Spencer*, 5 Idaho 557, 51 P. 609 (1897); *Knutsen v. Phillips*, 16 Idaho 267, 101 P. 596 (1909).

Bar commissioners. *In re Edwards*, 45 Idaho 676, 266 P. 665 (1928).

Blue sky law. *Boise Ass'n of Credit Men v. Seawell*, 47 Idaho 473, 276 P. 318 (1929).

Change of place of trial. *State v. Reed*, 3 Idaho 754, 35 P. 706 (1894).

Claim and delivery. *Blackfoot Stock Co. v. Delamue*, 3 Idaho 291, 29 P. 97 (1892).

Corporations. *Donaldson v. Thousand Springs Power Co.*, 29 Idaho 735, 162 P. 334 (1916) (on rehearing); *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 P. 32 (1927).

Costs. *McDonald v. Burke*, 3 Idaho (Hasb.) 266, 28 P. 440 (1892).

Criminal procedure. *State v. Watkins*, 7 Idaho 35, 59 P. 1106 (1900).

Depositions. *Darby v. Heagerty*, 2 Idaho (Hasb.) 282, 13 P. 85 (1887).

Disqualification of judges. *Hultner-Wallner v. Featherstone*, 48 Idaho 507, 283 P. 42 (1929).

Frauds. *C.R. Shaw Lumber Co. v. Manville*, 4 Idaho 369, 39 P. 559 (1895).

Guest statute. *Peterson v. Winn*, 84 Idaho

523, 373 P.2d 925 (1962).

Habeas corpus. *In re Dowling*, 4 Idaho 715, 43 P. 871 (1896).

Homestead and exemption. *Wright v. Westheimer*, 3 Idaho 232, 28 P. 430, 35 Am. St. 269 (1891); *Mellen v. McMannis*, 9 Idaho 418, 75 P. 98 (1904).

Incorporation of towns. *State ex rel. Holcomb v. Inhabitants of Pocatello*, 3 Idaho 174, 28 P. 411 (1891).

Lien. *Phillips v. Salmon River Mining & Dev. Co.*, 9 Idaho 149, 72 P. 886 (1903); *Mine & Smelter Supply Co. v. Idaho Consol. Mines Co.*, 20 Idaho 300, 118 P. 301 (1911); *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 P. 204 (1912); *Smith v. Faris-Kesl Constr. Co.*, 27 Idaho 407, 150 P. 25 (1915); *Armitage v. Bernheim*, 32 Idaho 594, 187 P. 938 (1919); *Abernathy v. Peterson*, 38 Idaho 727, 225 P. 132 (1924); *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926).

Limitations. 3 Idaho 672, 34 P. 813 (1893).

Local improvement districts. *McQueen v. City of Moscow*, 28 Idaho 146, 152 P. 799 (1915); *Gould v. Hill*, 43 Idaho 93, 251 P. 167 (1926); *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 264 P. 665 (1928).

New trial. *Coast Lumber Co. v. Wood*, 18 Idaho 28, 108 P. 338 (1910).

Pleading. *Wheeler v. Commercial Bank*, 5 Idaho 15, 46 P. 830 (1896); *State v. American Sur. Co.*, 26 Idaho 652, 145 P. 1097 (1914) (brief of counsel).

Revenue and taxation. *Salisbury v. Lane*, 7



Idaho 370, 63 P. 383 (1900); *Parsons v. Wrble*, 21 Idaho 695, 123 P. 638 (1912); *State ex rel. Peterson v. Dunlap*, 28 Idaho 784, 156 P. 1141, 1918A Ann. Cas. 546 (1916) (dissenting opinion); *Overland Co. v. Utter*, 44 Idaho 385, 257 P. 480 (1927); *Williams v. Baldridge*, 48 Idaho 618, 284 P. 203 (1930).

*Service of summons on nonresident. Guynn v. McDaneld*, 4 Idaho 605, 43 P. 74, 95 Am. St. 158 (1895).

*Sodomy. State v. Altwatter*, 29 Idaho 107, 157 P. 256 (1916).

*Syndicalism. In re Moore*, 38 Idaho 506, 224 P. 662 (1924).

*Undertaking on appeal. Barnes v. Buffalo Pitts Co.*, 6 Idaho 519, 57 P. 267 (1899); *Smith v. Field*, 19 Idaho 558, 114 P. 668 (1911).

*Water rights. Hamilton v. Swendsen*, 46 Idaho 175, 267 P. 229 (1928).

*Workmen's compensation. McNeil v. Panhandle Lumber Co.*, 34 Idaho 773, 203 P. 1068 (1921); *In re Larson*, 48 Idaho 136, 279 P. 1087 (1929); *Burchett v. Anaconda Copper Mining Co.*, 48 Idaho 524, 283 P. 515 (1929).

To restrict time within which materialman must perfect its lien to one day less than the six months in § 45-510 would not be in keeping with the policy of liberal construction embodied in this section. *Cather v. Kelso*, 103 Idaho 684, 652 P.2d 188 (1982).

### Common-Law Rule Changed.

This section changes the rule that statutes in derogation of common law must be strictly construed. *Darby v. Heagerty*, 2 Idaho (Hasb.) 282, 13 P. 85 (1887); *McQueen v. City of Moscow*, 28 Idaho 146, 152 P. 799 (1915).

In the exercise of its inherent judicial power the court may use the common law or other appropriate method if the statute or rule does not describe the procedure. *J.I. Case Co. v. McDonald*, 76 Idaho 223, 280 P.2d 1070 (1955).

### General Rules.

#### —Alternate Constructions.

When legislative act is fairly open to two constructions one of which will carry out and other defeat some public purpose, former should be adopted. *State ex rel. Black v. State Bd. of Educ.*, 33 Idaho 415, 196 P. 201 (1921).

#### —Change in Common Law.

It is not to be presumed that legislature intended to abrogate or modify rule of common law by enactment of statute upon same subject; it is rather to be presumed that no change in common law was intended, unless language employed clearly indicates such intention. *Cox v. St. Anthony Bank & Trust Co.*, 41 Idaho 776, 242 P. 785 (1925).

Changes in common law by adoption of statute are not to be presumed unless intent to accomplish that purpose appears. *Sprouse*

*v. Magee*, 46 Idaho 622, 269 P. 993 (1928).

In enacting the Workmen's Compensation Law abolishing every remedy for all injuries received by a workman in the course of his employment, the legislature did not intend to take from the workman his common-law remedy for the negligent act of his employer, resulting in serious injury and damage to the workman, and give the workman no other remedy in lieu thereof, and the legislature would be deemed to have assumed that every injury would impair the workman's usefulness in some degree, and that a workman should, in some measure, be compensated under the new remedy set up by the compensation law. *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941).

#### —Clerical and Typographical Errors.

Clerical errors or misprints in a statute, which would render it meaningless or absurd or which would defeat its intended operation, will not be permitted to go uncorrected when the true reading is obvious and the real meaning of the legislature is apparent on the face of the enactment taken as a whole. *Frontier Milling & Elevator Co. v. Roy White Coop. Mercantile Co.*, 25 Idaho 478, 138 P. 825 (1914).

Obvious clerical errors or misprints will be corrected or words read in if the omission or error is plainly indicated and the true meaning is obvious and the operation of the enactment would be otherwise defeated. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

#### —Conclusiveness of Board's Findings.

The accident board's findings of facts, when supported by sufficient, though conflicting, competent evidence, are conclusive upon the district court and Supreme Court. *Ramsay v. Sullivan Mining Co.*, 51 Idaho 366, 6 P.2d 856 (1931).

#### —Conflicting Acts.

The general rule at common law seems to have been that, of two inconsistent statutes enacted at the same session of the legislature, the one which went into effect at the later date would prevail. *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914).

Where two conflicting acts upon the same subject-matter are passed at the same session of the legislature, and their conflict is such that they cannot be harmonized and stand together, and where one of them contains an emergency clause and the other does not, and the one containing the emergency clause was passed by both houses of the legislature after the other, under such circumstances, the act containing the emergency clause should prevail over the other. *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914).

While it was not necessary for the purposes of this case to lay down a general rule for all

cases, the court said that it was inclined to the opinion that, in case of an irreconcilable conflict between two acts passed at the same session of the legislature, the one should prevail which was last approved by the governor. *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914).

When statutes are necessarily inconsistent, the statute which deals with the common subject-matter in a more minute and particular way will prevail over a statute of a more general nature. *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914); *Koelsch v. Girard*, 54 Idaho 452, 33 P.2d 816 (1934).

#### —Constitutionality Favored.

Doubt as to constitutionality of statute should be resolved in its favor, and to declare it unconstitutional it must clearly appear to be so. *State ex rel. Mitchell v. Dunbar*, 39 Idaho 691, 230 P. 33 (1924); *Smallwood v. Jeter*, 42 Idaho 169, 244 P. 149 (1926); *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244, 263 P. 32 (1927); *Packard v. O'Neil*, 45 Idaho 427, 262 P. 881 (1927); *In re Edwards*, 45 Idaho 676, 266 P. 665 (1928).

Test of constitutionality of act is not what is done thereunder in any particular instance, but what may be done under it. *Boise-Payette Lumber Co. v. Challis Indepen. Sch. Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928).

Public policy of state is to be found in its constitution and statutes, and statute cannot declare public policy contrary or repugnant to constitution. *Boise-Payette Lumber Co. v. Challis Independent Sch. Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928).

While tax exemption statutes are to be strictly construed, statute must be clearly prohibited by constitution before it can be declared in violation thereof. *Williams v. Baldrige*, 48 Idaho 618, 284 P. 203 (1930).

The cardinal principle of statutory construction is to save and not destroy. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

#### —Constitutional Law.

The general principles of statutory construction apply to the interpretation of the Constitution and also to Constitutional Amendments. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

#### —General and Particular Provisions.

A general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. *People ex rel. Springer v. Lytle*, 1 Idaho 143 (1867).

When there are two provisions in statute one of which is general and the other particular, latter will prevail; and if both cannot apply, particular provision will be treated as exception to general provision. *State v. Jones*, 34 Idaho 83, 199 P. 645 (1921); *Herrick v.*

*Gallet*, 35 Idaho 13, 204 P. 477 (1922); *In re Drainage Dist. No. 3*, 40 Idaho 549, 235 P. 895 (1925).

#### —Implied Repeals.

Though a subsequent statute be not repugnant in all its provisions to the prior one, yet if the latter was clearly intended to provide the only rule that should govern in the case provided for, it repeals the original act. *People ex rel. Springer v. Lytle*, 1 Idaho 143 (1867).

Subsequent statute does not repeal earlier one by implication unless the two are irreconcilable and inconsistent. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

In arriving at legislative intent as to act alleged to have impliedly repealed or superseded another statute, nature of several acts involved including their respective titles, history of such enactments, state of law when passed, together with history of times as well as objects and purposes to be attained, are proper matters for consideration. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

#### —Invoking Question of Constitutionality.

Constitutionality of statute will not be determined in any case unless such determination is absolutely necessary in order to determine merits of case in which constitutionality of such statute is drawn in question. *Abrams v. Jones*, 35 Idaho 532, 207 P. 724 (1922).

Constitutionality of statute must be raised at earliest possible moment consistent with good pleading and orderly procedure; otherwise it will be deemed to be waived. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

Party seeking to enforce statute or avail himself of its provisions may not question its constitutionality. *Brady v. Place*, 41 Idaho 747, 242 P. 314 (1925); *Brady v. Place*, 41 Idaho 753, 243 P. 654 (1926).

After portions of state law have been declared by federal courts to violate federal constitution, inquiry as to whether remaining portions which are not violative are sufficient in themselves, so that it cannot be said that entire act falls, ordinarily presents no federal question. *Stark v. McLaughlin*, 45 Idaho 112, 261 P. 244 (1927).

#### —Legislative Intent.

When a statutory or constitutional provision is adopted from another state, where the courts of the state have placed a construction upon the language of such statute or constitution, it is to be presumed that it was enacted in view of such judicial interpretation and that the purpose was to adopt the language as the same had been interpreted and construed by the courts of the state from



which it was taken. *Stein v. Morrison*, 9 Idaho 426, 75 P. 246 (1904).

Intent must be expressed by words used, and legislative intention not expressed in some appropriate manner has no legal existence. *State ex rel. Mitchell v. Dunbar*, 39 Idaho 691, 230 P. 33 (1924).

Court in construing statute should aim to give it sensible construction, such as will effectuate legislative intent, and, if possible, avoid absurd conclusion. *Hartman v. Meier*, 39 Idaho 261, 227 P. 25 (1924).

Where word, clause or sentence appears in statute which clearly defeats intention of legislature and which may be omitted without defeating object or purpose of statute, and where intention can be definitely determined with word or clause stricken out, this may be done. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

One of the recognized rules of construction of statutes is to look to the state of law when statute was enacted in order to see for what it was intended as substitute. *Cox v. St. Anthony Bank & Trust Co.*, 41 Idaho 776, 242 P. 785 (1925).

Intention of legislature may be ascertained not only from phraseology of statute but also by considering its nature, its design, and consequences which would follow from construing it one way or the other. *Overland Co. v. Utter*, 44 Idaho 385, 257 P. 480 (1927).

In construing statute, object is to determine what legislature intended and to give effect to that intention. *Hamilton v. Swendsen*, 46 Idaho 175, 267 P. 229 (1928); *Gallafent v. Tucker*, 48 Idaho 240, 281 P. 375 (1929); *Northern Pac. Ry. v. Shoshone County*, 63 Idaho 36, 116 P.2d 221 (1941).

Court is limited to declaration of intent of legislature and can neither legislate nor, by construction of statute, enlarge words to include other conduct of like, equal or greater atrocity, simply because it may be within the same mischief to be remedied, when it is not fairly included in language of act. In *re Dampier*, 46 Idaho 195, 267 P. 452 (1928).

In order to determine the meaning of an ambiguous statute, it is necessary to consider and construe together all the sections of the statutes applicable and, from all the provisions, determine what was really meant by the legislature. *Lebrecht v. Union Indem. Co.*, 53 Idaho 228, 22 P.2d 1066 (1933).

In the interpretation of a statute the court's only concern is to ascertain and give effect to the legislative intent as expressed, irrespective of the wisdom, practicability, policy, expediency, or possible results. *State ex rel. Parsons v. Bunting Tractor Co.*, 58 Idaho 617, 77 P.2d 464 (1938).

Where an amendment is made it carries with it the presumption that the legislature intended the statute thus amended to have a

meaning different than theretofore accorded it. *State ex rel. Parsons v. Bunting Tractor Co.*, 58 Idaho 617, 77 P.2d 464 (1938).

It is the duty of courts to execute laws according to their true intent and meaning; and that intent, when collected from the whole and every part of the statute taken together, must prevail over the literal sense of the terms and control the strict letter of the law. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

#### —Liberal Construction.

Workmen's Compensation Law must be liberally construed. *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941).

It has been the uniform practice of the Supreme Court to exercise liberality of construction in favor of employees under the Workmen's Compensation Law. *Anderson v. Woensner*, 66 Idaho 441, 159 P.2d 899 (1944).

All statutes must be liberally construed with a view to accomplishing their aims and purposes, attaining substantial justice, and the courts are not limited to the mere letter of the law, but may look behind the letter to determine its purpose and effect, the object being to determine what the legislature intended, and to give effect to that intent. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

#### —Mandatory or Directory.

Constitutional provisions are to be construed as mandatory unless by express provision or by necessary implication different intention is manifested. *State v. Malcom*, 39 Idaho 185, 226 P. 1083 (1924).

Negative or prohibitory statute will, as a general rule, be construed as mandatory. *State ex rel. Mitchell v. Dunbar*, 39 Idaho 691, 230 P. 33 (1924).

Statute may be mandatory in form, but if it is not clear that it was the intention of legislature that it should be so construed, courts may construe mandatory words to be directory only. *Overland Co. v. Utter*, 44 Idaho 385, 257 P. 480 (1927).

The word "may" appearing in legislation has the meaning or expresses the right to exercise discretion; a permissive right, rather than the imperative or mandatory meaning of "must." *State ex rel. Parsons v. Bunting Tractor Co.*, 58 Idaho 617, 77 P.2d 464 (1938).

#### —Purpose of Statutes.

In construing statute, court should take into consideration reason for law — that is, object and purpose of same, as well as legislative intention in its enactment. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

Object of statute must be kept in mind and it should not be given construction that will defeat end of justice. *Dunn v. Boise City*, 45 Idaho 362, 262 P. 507 (1927).

In construing statutes, courts are not limited to mere letter of law, but may look behind letter to determine its purpose and effect. *Hamilton v. Swendsen*, 46 Idaho 175, 267 P. 229 (1928).

#### —Stare Decisis.

Where statute has for long time been given fixed, definite meaning, courts will not change same except for most compelling reasons, although different construction might have been adopted to avoid hardship were it question of first instance. *Healy v. Taylor*, 37 Idaho 749, 218 P. 190 (1923).

#### —Statutes Construed Together.

Where two acts are passed and approved on the same day, they should be construed as a single act. *Oneida County v. Evans*, 25 Idaho 456, 138 P. 337 (1914); *Garrett Transf. & Storage Co. v. Pfost*, 54 Idaho 576, 33 P.2d 743 (1934).

Statutes of state must be construed together to the end that various sections and provisions may be made to harmonize. *State v. Montroy*, 37 Idaho 684, 217 P. 611 (1923).

Where general policy or purpose is plainly declared in series or system of statutes, any special provision in any of statutes should, if possible, be given construction which will bring them in harmony with that policy or purpose. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

No one provision of constitution or statute should be separated from all others and considered alone; but all provisions bearing on particular subject should be brought into view, and it is duty of court to have recourse to whole constitution, if necessary, to ascertain true intent and meaning of any particular provision. *Boise-Payette Lumber Co. v. Challis Independent Sch. Dist. No. 1*, 46 Idaho 403, 268 P. 26 (1928).

#### —Statutes in Pari Materia.

The rule that statutes in *pari materia* should be construed together applies with peculiar force to statutes passed at the same session of the legislature; they are to be construed together, and should be so construed, if possible, as to harmonize and give force and effect to the provisions of each. *Peavy v. McCombs*, 26 Idaho 143, 140 P. 965 (1914).

Where several laws are passed at same session of legislature and are in *pari materia* they should be construed together and reconciled, if possible. *State v. McBride*, 33 Idaho 124, 190 P. 247 (1920); *State ex rel. Mitchell v. Dunbar*, 39 Idaho 691, 230 P. 33 (1924).

Sections of statute which are in *pari materia* must be construed together. *Blackaby v. Dunning*, 40 Idaho 20, 232 P. 566 (1924).

#### —Statutory Construction Given by Officials.

The construction given to a statute by the executive and administrative officers of the state is entitled to great weight and will be followed unless there are cogent reasons for a change. *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

#### —Surplusage.

Words that fail to have any useful purpose may be eliminated in arriving at intention of legislature. *State v. Bowman*, 40 Idaho 470, 235 P. 577 (1925).

#### —Title of Act.

The rule which permits reading the title of an act in aid of statutory construction applies only in cases where the legislative meaning is left in doubt by failure to express it clearly and completely in the law. *Curoe v. Spokane & I.E.R.R.*, 32 Idaho 643, 186 P. 1101 (1920).

After the codification by the legislature of the laws of the state, it is too late to question the validity of one of them on the ground that the title of the bill by which it was originally enacted did not conform with Const., ch. 3, § 16. *Curoe v. Spokane & I.E.R.R.*, 32 Idaho 643, 186 P. 1101 (1920).

While a title is not required for a proposed constitutional amendment, nevertheless, if one exists, it may be resorted to as an aid to construction. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948).

#### —Words and Phrases.

Words "taxes" and "taxpayers" may have different meanings in different connections, and have been frequently construed in different senses by the courts. *Hartman v. Meier*, 39 Idaho 261, 227 P. 25 (1924).

In its broadest sense, regulatory license is a tax, but licensee is not taxpayer within meaning of statute. *Hartman v. Meier*, 39 Idaho 261, 227 P. 25 (1924).

Where ordinary words and terms of statute are used in sense in which they are generally understood it is not necessary to define or explain them. *State v. Marks*, 45 Idaho 92, 260 P. 697 (1927).

In construction of statutes words should be given their usual and ordinary meaning. *King v. Independent Sch. Dist. No. 37*, 46 Idaho 800, 272 P. 507 (1928); *State ex rel. Parsons v. Bunting Tractor Co.*, 58 Idaho 617, 77 P.2d 464 (1938).

#### Penal Statutes.

This section does not authorize courts, by a liberal construction of a statute, to include within it, as criminal, acts that are not clearly within its terms. *Ex parte Moore*, 38 Idaho 506, 224 P. 662 (1924); *Boise Ass'n of Credit Men Ltd. v. Seawell*, 47 Idaho 473, 276 P. 318 (1929).



**Cited in:** *Cooper v. Independent Transf. & Storage Co.*, 52 Idaho 747, 19 P.2d 1057 (1933); *Olson v. Union Pac. R.R.*, 62 Idaho 423, 112 P.2d 1005 (1941); *Idaho Times Pub. Co. v. Industrial Accident Bd.*, 63 Idaho 90, 126 P.2d 573 (1942); *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956); *Jordan v. Jordan*, 87 Idaho 432, 394 P.2d 163 (1964); *Doggett v. Boiler Eng'g & Supply Co.*, 93

Idaho 888, 477 P.2d 511 (1970); *Gavica v. Hanson*, 101 Idaho 58, 608 P.2d 861 (1980); *State ex rel. Kidwell v. United States Mktg., Inc.*, 102 Idaho 451, 631 P.2d 622 (1981); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986); *Sterling v. Bloom*, 111 Idaho 211, 723 P.2d 755 (1986).

**73-103. Codes continue existing law.** — The provisions of these compiled laws, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments. [C.C.P. 1881, § 4; R.S., § 5; reen. R.C., § 5; reen. C.L. 500:5; C.S., § 9445; I.C.A., § 70-103.]

### JUDICIAL DECISIONS

#### Amendments in Revisions.

Changes made by revision of statute, as distinguished from legislative enactment, will not be regarded as altering the law, unless it is clear such was intention, and if statute as revised is ambiguous, reference may be had to prior statutes. *Libby v. Pelham*, 30 Idaho 614,

166 P. 575 (1917); *Duncan v. Idaho County*, 42 Idaho 164, 245 P. 90 (1926).

Act, as originally passed, governs over same act as it appears in revision or codification of entire body of law. *State v. Purcell*, 39 Idaho 642, 228 P. 796 (1924).

**73-104. Tenure of offices preserved.** — All persons who at the time these compiled laws take effect hold office under any of the acts repealed, continue to hold the same according to the tenure thereof, except those offices which are not continued by these compiled laws. [R.S., § 6; reen. R.C., § 6; reen. C.L. 500:6; C.S., § 9446; I.C.A., § 70-104.]

**73-105. Certain offices to cease.** — When any office is abolished by the repeal of any act, and such act is not in substance re-enacted or continued in the compiled laws, such office ceases at the time the compiled laws take effect. [R.S., § 7; reen. R.C., § 7; reen. C.L. 500:7; C.S., § 9447; I.C.A., § 70-105.]

**73-106. Accrued rights and pending actions not affected.** — No action or proceeding commenced before the compiled laws take effect, and no right accrued, is affected by their provisions, but the proceedings therein must conform to the requirements of the compiled laws as far as applicable. [C.C.P. 1881, § 5; R.S., § 8; reen. R.C., § 8; reen. C.L. 500:8; C.S., § 9448; I.C.A., § 70-106.]

**73-107. Limitations not tolled.** — When a limitation or period of time prescribed in any existing statute for acquiring a right, or barring a remedy, or for any other purpose, has begun to run before these compiled laws go into effect, and the same or any limitation is prescribed in these compiled laws, the time which has already run shall be deemed part of the time herein prescribed as such limitation. [C.C.P. 1881, § 6; R.S., § 9; reen. R.C., § 9; reen. C.L. 500:9; C.S., § 9449; I.C.A., § 70-107.]

**73-108. Holidays enumerated.** — Holidays, within the meaning of these compiled laws, are:

Every Sunday;

January 1 (New Year's Day);

Third Monday in January (Martin Luther King, Jr.-Idaho Human Rights Day);

Third Monday in February (Washington's Birthday);

Last Monday in May (Memorial Day);

July 4 (Independence Day);

First Monday in September (Labor Day);

Second Monday in October (Columbus Day);

November 11 (Veterans Day);

Fourth Thursday in November (Thanksgiving Day);

December 25 (Christmas);

Every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday.

Any legal holiday that falls on Saturday, the preceding Friday shall be a holiday and any legal holiday enumerated herein other than Sunday that falls on Sunday, the following Monday shall be a holiday. [C.C.P. 1881, § 7; R.S., § 10; reen. R.C., § 10; am. 1909, p. 27; am. 1911, ch. 102, p. 344; am. 1911, ch. 158, p. 482; compiled and reen. C.L. 500:10; C.S., § 9450; am. 1925, ch. 80, § 1, p. 114; I.C.A., § 70-108; am. 1943, ch. 36, § 1, p. 68; am. 1945, ch. 38, § 1, p. 49; am. 1955, ch. 19, § 1, p. 38; am. 1969, ch. 11, § 1, p. 15; am. 1973, ch. 16, § 1, p. 32; am. 1977, ch. 167, § 2, p. 431; am. 1990, ch. 371, § 2, p. 1019; am. 2002, ch. 146, § 3, p. 419.]

### STATUTORY NOTES

**Cross References.** — Legal notices, publication on day following holiday, § 60-108.

Nonjudicial days, § 1-1607.

School holidays, § 33-512.

**Compiler's Notes.** — S.L. 1933, ch. 124 enlarged the powers of the governor to declare legal holidays and to limit such holidays to certain classes of business and activities and to restrict the issuance and enforcement of judicial writs and process during such holidays. Said act also provided that the authority conferred upon the governor by it should automatically terminate with the 31st day of December, 1934. Such chapter was repealed

by S.L. 1963, ch. 13, § 236.

The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 2 of S.L. 1943, ch. 36 declared an emergency. Approved Feb. 9, 1943.

Section 2 of S.L. 1945, ch. 38 declared an emergency. Approved Feb. 20, 1945.

Section 2 of S.L. 1955, ch. 19 declared an emergency. Approved February 7, 1955.

Section 2 of S.L. 1969, ch. 11 provided that this amendment should be effective January 1, 1971.

### JUDICIAL DECISIONS

#### ANALYSIS

Debt moratorium.

Saturday.

#### Debt Moratorium.

Where the substance of the controversy between the parties as to the constitutionality

of the moratorium statute has become moot and has disappeared by the effluxion of time, and a judgment rendered would be ineffec-



tual, the question will not be determined by the court. *Jorgensen v. George*, 56 Idaho 81, 50 P.2d 1 (1935).

**Saturday.**

It is well recognized and subject to judicial notice that the county offices in this state are closed all day Saturday for the transaction of

business. *Cather v. Kelso*, 103 Idaho 684, 652 P.2d 188 (1982).

**Cited in:** *Myers v. Harvey*, 39 Idaho 724, 229 P. 1112 (1924); *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957); *Idah-Best, Inc. v. First Sec. Bank*, 99 Idaho 517, 584 P.2d 1242 (1978).

**73-108A. Children's day.** — April 30 shall be designated as Children's Day/El Dia de los Ninos commemorative day in recognition of the importance of children to families and to communities. It is a day to celebrate the value of children and to focus on the importance of creating a future for children full of hope, health and success. Communities are encouraged to participate with special events and with children as the center of activity. [I.C., § 73-108A, as added by 2003, ch. 110, § 1, p. 348.]

### STATUTORY NOTES

**Prior Laws.** — Former § 73-108A, which ch. 1, § 1, p. 3) was repealed by S.L. 1990, ch. compiled (I.C., § 73-108A, as added by 1987, 371, § 3. For present law see § 73-108.

**73-108B. Constitutional commemorative day.** — September 17 shall be designated as constitutional commemorative day. The superintendent of public instruction shall be responsible for developing programs and suitable recognition of the constitution of the United States in conjunction with the commemorative day to be held annually on the anniversary of the signing of the constitution. [I.C., § 73-108B, as added by 1989, ch. 77, § 1, p. 139.]

**73-109. Computation of time.** — The time in which any act provided by law is to be done is computed by excluding the first day, and including the last unless the last is a holiday and then it is also excluded. [C.C.P. 1881, § 8; R.S., § 11; reen. R.C., § 11; reen. C.L. 500:11; C.S., § 9451; I.C.A., § 70-109.]

### JUDICIAL DECISIONS

#### ANALYSIS

Acceptance of nomination.  
 Certificate of nomination.  
 Direct primary law.  
 Fractions of days not counted.  
 Notice of appeal.  
 Notice of trial.  
 Saturday.  
 Service of summons.  
 Sundays.  
 Transcripts.  
 Weekend days.

**Acceptance of Nomination.**

These sections do apply to the time of filing an acceptance of nomination (C.L. 27:10). *Seawell v. Gifford*, 22 Idaho 295, 125 P. 182 (1912).

**Certificate of Nomination.**

Under former § 34-645 requiring the filing of certificate of nomination not less than forty (now thirty) days before ensuing general election, the tender of the certificate on the fortieth day before the election is timely, as against the contention that forty days were required to intervene between the date of filing and the date of election. *Oliason v. Girard*, 57 Idaho 41, 61 P.2d 288 (1936).

Doubt as to whether filing under nomination statute might be made on the fortieth (now thirtieth) day preceding election day should be resolved in favor of a citizen trying to avail himself of the privileges the statute intended to confer. *Oliason v. Girard*, 57 Idaho 41, 61 P.2d 288 (1936).

**Direct Primary Law.**

This section and § 73-110, have no application to the requirement of the direct primary law (C.L. 27:5) that nomination papers be filed at least thirty days prior to date of primary. *Seawell v. Gifford*, 22 Idaho 295, 125 P. 182 (1912).

The rule for computation of time in order to determine the date on which an act provided by law must be done is applicable in determining the maximum and minimum time within which filing may be made under nomination statute. *Oliason v. Girard*, 57 Idaho 41, 61 P.2d 288 (1936).

**Fractions of Days Not Counted.**

The law takes no notice of fractions of a day, and a fraction of a day is deemed a day unless in the particular case it is necessary to ascertain relative order of occurrences on the same day. *Oliason v. Girard*, 57 Idaho 41, 61 P.2d 288 (1936).

**Notice of Appeal.**

Notice of appeal filed on ninety-first day is good when last day fell on Sunday. *Falls Creek Timber Co. v. Day*, 39 Idaho 495, 228 P. 313 (1924); *Myers v. Harvey*, 39 Idaho 724, 229 P. 1112 (1924).

**Notice of Trial.**

Notice given on February 13 that case was set for trial in probate court on February 17 did not comply with statutory requirement of five days' notice. *Simpson v. Simpson*, 51 Idaho 99, 4 P.2d 345 (1931).

**Saturday.**

It is well recognized and subject to judicial notice that the county offices in this state are closed all day Saturday for the transaction of business. *Cather v. Kelso*, 103 Idaho 684, 652 P.2d 188 (1982).

**Service of Summons.**

Service on March 31 fixing hearing April 10 is a ten days' notice. *Empire Mill Co. v. District Court*, 27 Idaho 383, 149 P. 499, writ denied, 27 Idaho 400, 149 P. 505 (1915).

In computing time of service of summons, day on which service was made must be excluded. *Soderman v. Peterson*, 36 Idaho 414, 211 P. 448 (1922).

**Sundays.**

Where 90th day fell on Sunday appeal on following day though on 91st day was timely. *Huggins v. Green Top Dairy Farms, Inc.*, 74 Idaho 266, 260 P.2d 407 (1953).

**Transcripts.**

Transcript filed on Friday preceding Monday, the first day of the term of Supreme Court, was held to have been filed in time. *Sebree v. Smith*, 2 Idaho (Hasb.) 357, 16 P. 477 (1888).

**Weekend Days.**

Intervening weekend days must be included in computing the ten-day notice period for liquor license applicant to notify Alcohol Beverage Control Division of one's intention to accept the license. *Young v. Idaho Dep't of Law Enforcement*, 123 Idaho 870, 853 P.2d 615 (Ct. App. 1993).

**Cited in:** *Brockman v. Hall*, 37 Idaho 564, 218 P. 188 (1923); *In re Drainage Dist. No. 3*, 40 Idaho 549, 235 P. 895 (1925); *State v. Davidson*, 78 Idaho 553, 309 P.2d 211 (1957); *Harris v. Beco Corp.*, 110 Idaho 28, 713 P.2d 1387 (1986); *State v. Schaffer*, 112 Idaho 1024, 739 P.2d 323 (1987).

**73-110. Computation of time — Obligations maturing on holidays.** — Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed. [C.C.P. 1881, § 9; R.S., § 12; reen. R.C., § 12; reen. C.L. 500:12; C.S., § 9452; I.C.A., § 70-110.]



## JUDICIAL DECISIONS

**Cited in:** *Sabin v. Burke*, 4 Idaho 179, 37 P. 352 (1894); *State v. Gilbert*, 8 Idaho 346, 69 P. 62 (1902); *Seawell v. Gifford*, 22 Idaho 295, 125 P. 182 (1912); *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 307 P.2d 217 (1957).

**73-111. Seal defined.** — When the seal of a court, public officer or person is required by law to be affixed to any paper, the word “seal” includes an impression of such seal upon the paper, alone, as well as upon wax or a wafer affixed thereto; or, alternatively, the seal may be the mark of a rubber stamp providing substantially the same information as the impression. [C.C.P. 1881, § 10; R.S., § 13; reen. R.C., § 13; reen. C.L. 500:13; C.S., § 9453; I.C.A., § 70-111; am. 1979, ch. 203, § 2, p. 584.]

**73-112. Joint authority construed.** — Words giving a joint authority to three (3) or more public officers, or other persons, are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. [C.C.P. 1881, § 11; R.S., § 14; reen. R.C., § 14; reen. C.L. 500:14; C.S., § 9454; I.C.A., § 70-112.]

## JUDICIAL DECISIONS

**Construction.**

This section does not eliminate question of notice when required by the constitution of statutes, but is evidence of legislative intent to authorize a majority of all deriving their powers from legislature to act in every matter

over which they have authority, unless otherwise expressed by statute. *Akley v. Perrin*, 10 Idaho 531, 79 P. 192 (1905).

**Cited in:** *Gowey v. Siggelkow*, 85 Idaho 574, 382 P.2d 764 (1963).

**73-113. Construction of words and phrases.** — Words and phrases are construed according to the context and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition. [C.C.P. 1881, § 12; R.S., § 15; reen. R.C., § 15; reen. C.L. 500:15; C.S., § 9455; I.C.A., § 70-113.]

## JUDICIAL DECISIONS

## ANALYSIS

Adoption of statutory or constitutional provision.

Application.

Application to particular statutes.

Intent of legislature.

Presumption court followed section.

Words without technical meaning.

**Adoption of Statutory or Constitutional Provision.**

By the adoption of a constitutional or statutory provision from another jurisdiction after the courts of such jurisdiction have construed the same, it is presumed that such construction was also adopted. *Bishop v.*

*Morrison-Knudsen Co.*, 64 Idaho 806, 137 P.2d 963 (1943).

**Application.**

A basic rule of statutory construction is that the application of a statute is an aid to construction, especially where the public relies

on that application over a long period of time. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 947 P.2d 400 (1997).

#### **Application to Particular Statutes.**

Attachment. *Howard v. Grimes Pass Placer Mining Co.*, 21 Idaho 12, 120 P. 170 (1911).

Fraud in managing corporation. *State v. Paulsen*, 21 Idaho 686, 123 P. 588 (1912).

Guest statute. *Peterson v. Winn*, 84 Idaho 523, 373 P.2d 925 (1962).

Horticultural inspectors. *Ingard v. Barker*, 27 Idaho 124, 147 P. 293 (1915).

Intoxicating liquors. *Ada County v. Boise Com. Club*, 20 Idaho 421, 118 P. 1086 (1911).

Murder indictment. *Territory v. Evans*, 2 Idaho (Hasb.) 391, 17 P. 139 (1888).

School districts. In re Segregation of School Dist. No. 58, 34 Idaho 222, 200 P. 138 (1921).

Sunday closing. *State v. Morris*, 28 Idaho 599, 155 P. 296 (1916).

Wife's separate property. *Sencerbox v. First Nat'l Bank*, 14 Idaho 95, 93 P. 369 (1908).

Withdrawal of attorney. *Smith-Nieland v. Reed*, 39 Idaho 788, 231 P. 102 (1924).

#### **Intent of Legislature.**

While word "agree" usually imports unanimity and under ordinary conditions will be given that meaning, yet where word "unanimously" was stricken out by amendment after original bill was introduced, meaning of word "agree" will be considered modified to conform to intention of legislature. In re Segregation of School Dist. No. 58, 34 Idaho 222, 200 P. 138 (1921).

#### **Presumption Court Followed Section.**

On appeal the Supreme Court will assume that the trial court determined the meaning of any words in question in accordance with

the rule provided by this section and in the light of the evidence adduced on the hearing. *First Sec. Bank v. Enking*, 54 Idaho 735, 35 P.2d 266 (1934).

#### **Words Without Technical Meaning.**

A statute written in plain and ordinary language in common every-day use, dealing with a subject that is neither technical nor scientific, should be construed as the ordinary reading public would read and understand it. *Howard v. Grimes Pass Placer Mining Co.*, 21 Idaho 12, 120 P. 170 (1911).

When words have no technical meaning or when they have not been used or employed in a technical sense in the statute, they should be given their ordinary significance as popularly understood. *State v. Morris*, 28 Idaho 599, 155 P. 296 (1916).

The word "forfeit" is in common usage and its popular and accepted meaning is "to lose" or "to lose the right to." *Nagel v. Hammond*, 90 Idaho 96, 408 P.2d 468 (1965).

**Cited in:** *Territory v. Evans*, 2 Idaho (Hasb.) 425, 17 P. 139 (1888); *Sencerbox v. First Nat'l Bank*, 14 Idaho 95, 93 P. 369 (1908); *Ada County v. Boise Com. Club*, 20 Idaho 421, 118 P. 1086 (1911); *State v. Paulsen*, 21 Idaho 686, 123 P. 588 (1912); *Ingard v. Barker*, 27 Idaho 124, 147 P. 293 (1915); *J.C. Penney Co. v. Diefendorf*, 54 Idaho 374, 32 P.2d 784 (1934); *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944); *Estate of McCann*, 94 Idaho 386, 488 P.2d 357 (1971); *State v. Carpenter*, 113 Idaho 882, 749 P.2d 501 (Ct. App. 1988); *State v. Baer*, 132 Idaho 416, 973 P.2d 768 (Ct. App. 1999); *State v. Miller*, 134 Idaho 458, 4 P.3d 570 (Ct. App. 2000); *State v. Edghill*, 134 Idaho 218, 999 P.2d 255 (Ct. App. 2000).

**73-114. Statutory terms defined.** — Unless otherwise defined for purposes of a specific statute, words used in these compiled laws in the present tense, include the future as well as the present; words used in the masculine gender, include the feminine and neuter; the singular number includes the plural and the plural the singular; the word "person" includes a corporation as well as a natural person; writing includes printing; oath includes affirmation or declaration, and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness.

The following words have, in the compiled laws, the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property.
2. The words "real property" are coextensive with lands, tenements and hereditaments, possessory rights and claims.



3. The words "personal property" include money, goods, chattels, things in action, evidences of debt and general intangibles as defined in the Uniform Commercial Code — Secured Transactions.

4. The word "month" means a calendar month, unless otherwise expressed.

5. The word "will" includes codicils.

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer, and the word "process," a writ or summons issued in the course of judicial proceedings.

7. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the District and territories.

8. The words "registered mail" include certified mail. [C.C.P. 1881, § 13; R.S., § 16; reen. R.C., § 16; reen. C.L. 500:16; C.S., § 9456; reen. 1899, ch. 5, § 1, p. 147; reen. R.C., § 5149; reen. C.L. 500:16; C.S., § 9456; I.C.A., § 70-114; am. 1959, ch. 16, § 1, p. 36; am. 1967, ch. 272, § 31, p. 745.]

### STATUTORY NOTES

**Cross References.** — Secured transactions under Uniform Commercial Code, §§ 28-9-101 — 28-9-526.

**Compiler's Notes.** — There was a partial duplication of this section in the mechanics' lien law, S.L. 1893, ch. 5, § 1, p. 49.

Section 33 of S.L. 1967, ch. 272, read as follows: "Transactions validly entered into before the effective date specified in section 32 and the rights, duties and interest flowing

from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute amended by this act as though such amendment had not occurred."

**Effective Dates.** — Section 32 of S.L. 1967, ch. 272, provided that the act should become effective at midnight December 31, 1967, contemporaneously with the Uniform Commercial Code.

### JUDICIAL DECISIONS

#### ANALYSIS

Application of section.

"Corporation" defined.

Excise tax.

Income.

Masculine and feminine genders.

Nuncupative will.

"Person aggrieved" defined.

Property exempt from general tax.

School districts.

Sufficiency of attestation of mark.

#### Application of Section.

By providing for a probationary period of "1,040 hours" in an administrative rule, rather than six calendar months, the Personnel Commission erroneously construed § 67-5309. *Hood v. Idaho Dep't of Health & Welfare*, 125 Idaho 151, 868 P.2d 479 (1994).

*Person. Ada County v. Boise Com. Club*, 20 Idaho 421, 118 P. 1086 (1911); *Riggen v. Perkins*, 42 Idaho 391, 246 P. 962 (1926); *State v. Lockie*, 43 Idaho 580, 253 P. 618 (1927).

*Personal property. Murphy v. Montandon*, 3

*Idaho (Hasb.)* 325, 29 P. 851 (1892); *Sencerbox v. First Nat'l Bank*, 14 Idaho 95, 93 P. 369 (1908); *Meholin v. Carlson*, 17 Idaho 742, 107 P. 755 (1910); *Twin Falls Bank & Trust Co. v. Weinberg*, 44 Idaho 332, 257 P. 31 (1927).

*Real property. Hall v. Blackman*, 8 Idaho 272, 68 P. 19 (1902).

*Singular and plural. Houser v. Hobart*, 22 Idaho 735, 127 P. 997 (1912); *State v. Holder*, 49 Idaho 514, 290 P. 387 (1930).

*Writ. State v. Arregui*, 44 Idaho 43, 254 P. 788 (1927).

This section serves as an instructive guide

to be applied only when it is necessary to carry out the obvious intent of the legislature and it is neither mandatory nor a rule of general application. *C. Forsman Real Estate Co. v. Hatch*, 97 Idaho 511, 547 P.2d 1116 (1976).

The provisions of this section cannot be applied to § 6-801 in order to imply legislative support of the "unit" rule in Idaho comparative negligence cases since this section is to be used only to give effect to legislative intent rather than to determine it. *Odenwalt v. Zaring*, 102 Idaho 1, 624 P.2d 383 (1980).

### **"Corporation" Defined.**

A corporation is a "person" as that term is used in the criminal statutes. *State v. Adjustment Dept. Credit Bureau, Inc.*, 94 Idaho 156, 483 P.2d 687 (1971).

### **Excise Tax.**

An excise tax is any tax which does not fall within the classification of poll tax or a property tax and includes every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege or the engaging in an occupation. *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307 (1932).

### **Income.**

Income is something derived from property, labor, skill, ingenuity or sound judgment or from two or more in combination, upon which a tax may be levied. *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307 (1932).

### **Masculine and Feminine Genders.**

Women held not legally competent to act as jurors. *State v. Kelley*, 39 Idaho 668, 229 P. 659 (1924). But this is no longer true, see § 2-104.

Where ordinance, providing for giving of bond, and the bond given thereunder by a public depository to a city treasurer, who happened to be a woman, each used the pronoun "her," the obligation of the bond was not limited to the term of that particular treasurer but covered subsequent masculine incumbents. *City of Pocatello v. Fargo*, 41 Idaho 432, 242 P. 297 (1925).

### **Nuncupative Will.**

In the absence of a statutory definition of nuncupative wills, courts must look to the

common law for the meaning of that term. *Cannon v. Seyboldt*, 55 Idaho 796, 48 P.2d 406 (1935).

Evidence was insufficient to establish nuncupative will, where it did not appear that deceased believed he was about to die when conversation with the witnesses occurred, or that he asked anyone to bear witness that the statements constituted his will. *Cannon v. Seyboldt*, 55 Idaho 796, 48 P.2d 406 (1935).

### **"Person Aggrieved" Defined.**

An appeal filed by city from order incorporating a village to which incorporation the city objected on the grounds that the proposed village contained fewer than 125 residents, that the proposed boundaries were irregular, bizarre and fantastic, that its incorporation would materially hamper the ordinary growth of the city would be dismissed on the ground that the city was neither a "person aggrieved" by the order, nor a "taxpayer of the county" and therefore was not authorized to appeal under the provisions of former § 31-1509. In re *Fernan Lake Village*, 80 Idaho 412, 331 P.2d 278 (1958).

### **Property Exempt from General Tax.**

General tax acts of a state are never held to include its own property, or that of its municipal corporations, although not in terms exempted from taxation. *City of Idaho Falls v. Pfost*, 53 Idaho 247, 23 P.2d 245 (1933).

### **School Districts.**

The words "school districts," as used in former § 63-908, relating to county school equalization fund, meant any one or more school districts organized or unorganized. *Northern Pac. Ry. v. Shoshone County*, 63 Idaho 36, 116 P.2d 221 (1941).

### **Sufficiency of Attestation of Mark.**

Mark made in place of a signature is sufficiently witnessed by notary's signature affixed to his certificate of acknowledgment of instrument. *First Nat'l Bank v. Glenn*, 10 Idaho 224, 77 P. 623 (1904).

**Cited in:** *White v. Conference Claimants Endowment Comm'n*, 81 Idaho 17, 336 P.2d 674 (1959); *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 591 P.2d 1078 (1979); *Fulton v. Duro*, 107 Idaho 240, 687 P.2d 1367 (Ct. App. 1984); *Fremont-Madison Irrigation Dist. v. United States Dep't of Interior*, 763 F.2d 1084 (9th Cir. 1985).

**73-115. General repeal of existing law.** — No statute law is continued in force because it is consistent with the provisions of the compiled laws on the same subject, but in all cases provided for therein all statute laws heretofore in force in this state, whether consistent or not with the provisions of the compiled laws, unless expressly continued in force, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing



or accrued, or any action or proceeding already taken, except as in these compiled laws provided; nor does it affect any local or special statute not expressly repealed; nor does it affect any outstanding unexpended appropriation. [Based on R.S., § 17; am. R.C., § 17; reen. C.L. 500:17; C.S., § 9457; I.C.A., § 70-115.]

## JUDICIAL DECISIONS

### ANALYSIS

Construction.

Legislative intent.

#### Construction.

Some doubt is cast upon completeness of this repeal by the dictum of court. *Sanders v. Coeur d'Alene*, 27 Idaho 353, 149 P. 290 (1915).

#### Legislative Intent.

In arriving at the legislative intent of an act alleged to have repealed or superseded an-

other, the nature of the several acts involved with their history as well as the objects and purposes sought to be attained, are to be considered. *State v. Martinez*, 43 Idaho 180, 250 P. 239 (1926).

**Cited in:** *Cunningham v. George*, 3 Idaho 456, 31 P. 809 (1892); *Evans v. Huston*, 27 Idaho 559, 150 P. 14 (1915); *Northern Pac. R.R. v. Hirzel*, 29 Idaho 438, 161 P. 854 (1916).

**73-116. Common law in force.** — The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state. [1864, p. 527, § 1; R.S., § 18; reen. R.C., § 18; reen. C.L. 500:18; C.S., § 9460; I.C.A., § 70-116.]

## JUDICIAL DECISIONS

### ANALYSIS

Champertry and maintenance.

Community standard of health care.

Custom.

Defense.

Distress damage feasant.

Husband and wife.

In general.

Inheritance by alien.

Judgment non obstante veredicto.

Modification.

Monopolies.

— Rate structure.

Necessity.

Recision of insurance contract.

Removal of trees.

Riparian rights.

Rule against perpetuities.

School district.

Statute unconstitutional — Common law applied.

Succession of property.

Survival of actions.

Treasure trove.

Use by court.

**Champerty and Maintenance.**

Common-law rule of champerty and maintenance is not in force in this state. *Merchants Protective Ass'n v. Jacobsen*, 22 Idaho 636, 127 P. 315 (1912).

**Community Standard of Health Care.**

Because defendant doctor was one of only six cardiovascular surgeons in the state of Idaho and all six of these cardiovascular surgeons practiced together in Boise as a professional association, the standard of health care practice in the community ordinarily served by hospital was indeterminable and no "similar Idaho communities" existed about which plaintiff could have presented evidence of the standard of practice for a cardiovascular surgeon performing patent ductus arteriosus surgery; therefore, §§ 6-1012 and 6-1013 did not provide a means of establishing the applicable standard of practice in this case and in resolving whether out-of-state doctor qualified as an expert witness to testify on plaintiff's behalf, the court turned to decisions predating the enactment of §§ 6-1012 and 6-1013. *Hoene v. Barnes*, 121 Idaho 752, 828 P.2d 315 (1992).

**Custom.**

There being no statute which expressly or impliedly rejects the doctrine of custom, the doctrine does obtain in Idaho. *State ex rel. Haman v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979).

**Defense.**

The possibility of harm at an indeterminate date in the future is insufficient to satisfy the first element of the necessity defense, a specific threat of immediate harm. *State v. Howley*, 128 Idaho 874, 920 P.2d 391 (1996).

**Distress Damage Feasant.**

Right of distress damage feasant existed under common law and is applicable to this state insofar as it is not repugnant to or inconsistent with constitution and laws. *Kelly v. Easton*, 35 Idaho 340, 207 P. 129 (1922).

**Husband and Wife.**

Where plaintiff brought an action for damages to her person and character for torts committed against her during coverture, she may join her husband as a party defendant, if he participated in the wrongs, as constitution and statutes as a whole removed common-law rule that a married woman could not sue her husband for wrongs committed by him against her person. *Lorang v. Hays*, 69 Idaho 440, 209 P.2d 733 (1949).

**In General.**

The common law, so far as it is not repugnant to or inconsistent with the Constitution or laws of the United States, is a rule of decision of the courts of Idaho only in cases

not provided for by the statutory law of this state. *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957); *Industrial Indem. Co. v. Columbia Basin Steel & Iron, Inc.*, 93 Idaho 719, 471 P.2d 574 (1970).

Although legislature may abrogate the common law, it cannot do so in an unconstitutional manner. *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).

The common law is still in effect in Idaho. *State v. Grow*, 93 Idaho 588, 468 P.2d 320 (1970).

This section provides that the rules of the common law are in effect unless modified by other legislative enactments. *Evans v. Twin Falls County*, 118 Idaho 210, 796 P.2d 87 (1990), cert. denied, 498 U.S. 1086, 111 S. Ct. 960, 112 L. Ed. 2d 1048 (1991).

**Inheritance by Alien.**

Common-law rule that alien had no inheritable blood and could not claim through intestate has been modified in this state by § 14-116. *Connolly v. Reed*, 22 Idaho 29, 125 P. 213 (1912).

**Judgment Non Obstante Veredicto.**

Practice of judgment non obstante veredicto is wholly foreign to, and is, if not in explicit terms, at least apparently by implication, denied by code. *Prairie Flour Mill Co. v. Farmers Elevator Co.*, 45 Idaho 229, 261 P. 673 (1927) (decided prior to statutory amendments).

**Modification.**

Common law can almost always be overturned or modified by the legislature. *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971).

**Monopolies.****—Rate Structure.**

There is no common-law right to reasonable rates from any monopoly created by the state. *Miles v. Idaho Power Co.*, 116 Idaho 635, 778 P.2d 757 (1989).

**Necessity.**

Defendant charged with possession of marijuana was entitled to present evidence at trial on the common-law defense of necessity because of her claim that she suffered from rheumatoid arthritis and used marijuana to control the pain and muscle spasms associated with that disease. *State v. Hastings*, 118 Idaho 854, 801 P.2d 563 (1990).

**Recision of Insurance Contract.**

Rules of the common law were in effect in Idaho under the provisions of this section, unless modified by other legislative enactments; and a party that desired to rescind a contract had to, prior to rescinding, tender back to the other party any consideration or benefit received under the contract by the



rescinding party. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 45 P.3d 829 (2002).

### **Removal of Trees.**

The common law of England being followed insofar as not repugnant to the laws of Idaho and the Constitutions of the United States and the state of Idaho would be followed in an action to remove trees damaging the foundation of a house. *Lemon v. Curington*, 78 Idaho 522, 306 P.2d 1091 (1957).

### **Riparian Rights.**

Riparian owner upon streams of this state, both navigable and nonnavigable, takes to thread of stream, subject, however, to an easement for use of the public. *Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908).

Common-law doctrine of riparian rights insofar as those rights conflict with right of an appropriator of the waters of a stream, is repugnant to, and in conflict with, the constitution and statutes of this state, and to that extent has been abrogated thereby. *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059, 133 Am. St. 125 (1909).

This section adopts only so much of the common law as is applicable to conditions in this state. English doctrine of riparian rights on navigable streams has been repeatedly held not applicable to this country. *Northern Pac. R.R. v. Hirzel*, 29 Idaho 438, 161 P. 854 (1916).

### **Rule Against Perpetuities.**

The common-law rule against perpetuities is generally stated to be that no interest in real estate is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest plus the period of gestation. *Locklear v. Tucker*, 69 Idaho 84, 203 P.2d 380 (1949).

Idaho has adopted what is intended to be a complete system governing alienation of real property; and the common-law rule against perpetuities is not in force in this jurisdiction. *Locklear v. Tucker*, 69 Idaho 84, 203 P.2d 380 (1949).

### **School District.**

A school district is not entitled to a preference of its claim against a closed bank's assets for the amount of an unpaid cashier's check received for the school district's check on its unsecured sinking fund deposit and sent to the state finance commissioner in payment of the district's indebtedness to the state department of public investments, in the absence of a showing that the bank acted only as district's agent in transmitting funds. *Independent Sch. Dist. No. 1 v. Diefendorf*, 57 Idaho 191, 64 P.2d 393 (1937).

### **Statute Unconstitutional — Common Law Applied.**

When statutory provision for compensation by the state to utilities ordered to relocate their facilities was declared unconstitutional, the common-law rule that a utility forced to move its facilities must do so at its own expense was applied. *State ex rel. Rich v. Idaho Power Co.*, 81 Idaho 487, 346 P.2d 596 (1959).

### **Succession of Property.**

Under the code a complete system for the succession to property of decedent is provided for; hence, court will not consider the common law. *In re Reil's Estate*, 70 Idaho 64, 211 P.2d 407 (1949).

Statutes governing succession in property incorporated in § 14-103 determine who are the heirs of an intestate decedent and common-law definition of heirs does not apply. *In re Hornby's Estate*, 75 Idaho 361, 272 P.2d 1017 (1954).

As the state statutes purport to provide a complete system for the succession to property of decedents, the common-law restriction on succession of a killer to the estate of his victim would not apply to the claim of one convicted of the voluntary manslaughter of her husband as to a situation for which there is no statutory declaration or provision. *Anstine v. Hawkins*, 92 Idaho 561, 447 P.2d 677 (1968).

### **Survival of Actions.**

An action for the destruction of personal property caused by the negligence of a tortfeasor survives the tort-feasor, but consequential damages flowing from the injury to the person of the deceased in his lifetime does not survive. *Moon v. Bullock*, 65 Idaho 594, 151 P.2d 765 (1944).

### **Treasure Trove.**

Because it was already beginning to be abrogated in England hundreds of years before Idaho was settled, the doctrine of treasure trove was not part of the common law adopted in Idaho upon enactment of the statute. *Corliss v. Wenner*, 135 Idaho 832, 25 P.3d 855 (Ct. App. 2001).

### **Use by Court.**

In the exercise of its inherent judicial power the court may use the common law or other appropriate method if the statute or rule does not describe the procedure. *J.I. Case Co. v. McDonald*, 76 Idaho 223, 280 P.2d 1070 (1955).

**Cited in:** *Good v. Good*, 79 Idaho 119, 311 P.2d 756 (1957); *Killgore v. Killgore*, 84 Idaho 226, 370 P.2d 512 (1962); *Suchan v. Rutherford*, 90 Idaho 288, 410 P.2d 434 (1966); *Doggett v. Boiler Eng'g & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970); *Jones v.*

State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976); State v. Lawrence, 98 Idaho 399, 565 P.2d 989 (1977); School Dist. No. 351 Oneida County v. Oneida Educ. Ass'n, 98 Idaho 486, 567 P.2d 830 (1977); State v. Huggins, 103 Idaho 422, 648 P.2d 1135 (Ct. App. 1982), *aff'd in part*, 105 Idaho 43, 665

P.2d 1053 (1983); Jonasson v. Gibson, 108 Idaho 459, 700 P.2d 81 (Ct. App. 1985); Idaho Dep't of Law Enforcement *ex rel* Cade v. Real Property Located in Minidoka County, 126 Idaho 411, 885 P.2d 381 (1994); Kirkland *ex rel*. Kirkland v. Blain County Med. Ctr., 134 Idaho 464, 4 P.3d 1115 (2000).

**73-117. Prior legislation repealed.** — All general acts and parts and clauses of acts of a general nature passed prior to the fifteenth session of the state legislature, are hereby repealed, and these compiled laws are in force in lieu thereof; but such repeal does not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal takes effect, but all rights and liabilities under said repealed acts continue, in the same manner as if said repeal had not been made. [R.S., § 19; am. R.C., § 19; am. C.L. 500:19; C.S., § 9461; I.C.A., § 70-117.]

#### JUDICIAL DECISIONS

##### Scope of Revision.

Whatever is included in a statutory revision must be construed together as the law; all that formerly existed but is not included is

repealed. Territory v. Evans, 2 Idaho (Hasb.) 651, 23 P. 232 (1890).

**Cited in:** Cunningham v. George, 3 Idaho 456, 31 P. 809 (1892).

**73-118. Past offenses may be prosecuted.** — All offenses committed and all penalties or forfeitures incurred prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made. [R.S., § 20; reen. R.C., § 20; reen. C.L. 500:20; C.S., § 9462; I.C.A., § 70-118.]

**73-119. Special and local laws continued.** — The following acts and parts of acts are the local and special statutes which are continued in force, except insofar as the same have been modified, amended, superseded or repealed by other legislation. All others are hereby repealed.

1. All those special and local laws continued in force by an act entitled "An act to provide for continuing in force certain special and local laws and repealing all others," approved February 10, 1887, which said local and special laws are embraced within the publication known as "Local and special laws of Idaho territory," printed by direction of the fourteenth session of the territorial legislative assembly.

2. All those special and local laws continued in force by the Revised Codes of Idaho, 1908, section 17.

3. An act entitled, "An act establishing insurance fund of capitol building annex, deaf, dumb and blind asylum insurance fund," etc., approved Feb. 24, 1909. [1909, p. 21, H.B. 38.]

4. An act amendatory of the establishment of the graded public schools of the city of Lewiston, approved March 6, 1909. [1909, p. 43, H.B. 105.]

5. An act providing for the sale and conveyance by the state board of land commissioners of a tract of land situated within the village of Blackfoot, Idaho, approved March 11, 1909. [1909, p. 65, H.B. 135.]



6. An act amending the charter of Boise City, approved March 11, 1909. [1909, p. 113, H.B. 297.]

7. An act amending an act entitled, "An act to create the independent school district of Emmettville," approved March 15, 1909. [1909, p. 188, H.B. 189.]

8. An act entitled, "An act levying and requiring the collection of a special ad valorem tax for the payment of interest upon certain bonds issued by the state of Idaho," etc., approved March 11, 1909. [1909, p. 304, H.B. 308.]

9. An act amending the charter of the city of Bellevue, approved March 11, 1909. [1909, p. 320, H.B. 254.]

10. An act amending an act entitled, "An act to create independent school district of Emmettville," approved March 13, 1909. [1909, p. 340, H.B. 129.]

11. An act "providing for the issuing, sale and redemption of state bonds for the purpose of improving the Idaho soldiers' home," approved March 16, 1909. [1909, p. 365, H.B. 304.]

12. An act "providing for the issuing of state bonds for the additional buildings and improvements of the northern Idaho insane asylum," approved March 16, 1909. [1909, p. 368, H.B. 302.]

13. An act "providing for the issuing, sale and redemption of state bonds for the purpose of completing the cell house at the state penitentiary," approved March 16, 1909. [1909, p. 370, H.B. 303.]

14. An act entitled, "An act providing for the issuance and sale of state bonds to the amount of \$55,000 for the Idaho industrial training school," etc., approved March 16, 1909. [1909, p. 376, H.B. 95.]

15. An act entitled, "An act to provide for the establishment, building and equipment of a state school for the deaf and the blind; to provide for the issuance, sale and redemption of bonds," etc., sections 7 to 14, inclusive, approved March 16, 1909. [1909, p. 379, H.B. 194.]

16. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$52,000 and appropriating the proceeds thereof to the university of Idaho," etc., approved March 16, 1909. [1909, p. 382, H.B. 8.]

17. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$36,000 and appropriating the proceeds thereof to the academy of Idaho," etc., approved March 16, 1909. [1909, p. 385, H.B. 37.]

18. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$15,000 for the construction of a wagon bridge across the Salmon river," etc., approved March 17, 1909. [1909, p. 390, H.B. 85.]

19. An act entitled, "An act providing for the issuing and sale of state bonds in the sum of \$10,000 for the construction of a wagon bridge across the Snake river between the counties of Lincoln and Cassia, Idaho," etc., approved March 16, 1909. [1909, p. 397, H.B. 198.]

20. An act entitled, "An act providing for the issue, sale and redemption of state bonds for the purpose of erecting and equipping a gymnasium building for Lewiston normal school," etc., approved March 17, 1909. [1909, p. 404, H.B. 27.]

21. An act entitled, "An act providing for the issuance and sale of state bonds in the aggregate sum of \$73,000 to the university of Idaho," etc., approved March 17, 1909. [1909, p. 407, H.B. 12.]

22. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$18,000 for the construction of a wagon bridge across the Kootenai river at Bonners Ferry in Bonners County, Idaho," etc., approved March 17, 1909. [1909, p. 413, S.B. 15.]

23. An act entitled, "An act to provide for the completion of the Paris-Franklin road in the counties of Bear Lake and Oneida," etc., approved March 17, 1909. [1909, p. 419, H.B. 174.]

24. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$60,000 to the continuance of the construction of the capitol building at Boise, Idaho," etc., approved March 16, 1909. [1909, p. 423, H.B. 74.]

25. An act entitled, "An act providing for the issuance and sale of bonds in the sum of \$36,000 for the purpose of building and equipping a gymnasium for the Albion state normal school," etc., approved March 17, 1909. [1909, p. 426, H.B. 81.]

26. Section 6 of an act authorizing the relinquishment of Marble Creek lands, approved Feb. 8, 1911. [1911, ch. 6, § 6, p. 18.]

27. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$10,000 for the construction of a wagon bridge across the Snake river at a point north of the north end of Overland avenue of the village of Burley," etc. Became a law without approval Feb. 13, 1911. [1911, ch. 1, p. 18.]

28. An act entitled, "An act appropriating the sum of \$15,000 for the construction of a wagon bridge across the Salmon river," etc., approved Feb. 18, 1911. [1911, ch. 16, p. 39.]

29. An act entitled, "An act appropriating \$3,059.10 for 8740.28 acres of state lands within the Black Canyon irrigation district," etc., approved Feb. 27, 1911. [1911, ch. 22, p. 47.]

30. An act entitled, "An act authorizing the governor and secretary of state to convey certain lots in Morehead's addition to the city of Weiser," etc., approved March 3, 1911. [1911, ch. 36, p. 76.]

31. An act entitled, "An act to provide for the establishment, building and equipping of the Idaho state sanitarium," etc., approved March 4, 1911. [1911, ch. 41, p. 86.]

32. An act entitled, "An act authorizing the state board of education to cause to be erected a building near Gooding as a part of the Idaho state school for the deaf and the blind," etc., approved March 4, 1911. [1911, ch. 42, p. 97.]

33. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$750,000 and appropriating the proceeds thereof to the completion of the construction of the central section of the capitol building at Boise," etc., approved March 7, 1911. [1911, ch. 47, p. 104.]

34. An act entitled, "An act providing for the issuing of state bonds to the amount of \$35,000 for the additional buildings and improvements of the northern Idaho insane asylum," etc., approved March 7, 1911. [1911, ch. 53, p. 118.]

35. An act entitled, "An act authorizing the state board of land commissioners to extend the time of final payment due on all certificates of sale for



school lands in the year 1911," etc., approved March 9, 1911. [1911, ch. 66, p. 188.]

36. An act entitled, "An act providing for the issuing, sale and redemption of state bonds for the purpose of improving the Idaho state penitentiary at Boise," approved March 10, 1911. [1911, ch. 69, p. 191.]

37. Section 3 of an act validating previously incorporated religious and benevolent corporations, approved March 11, 1911. [1911, ch. 74, § 3, p. 229.]

38. An act entitled, "An act providing for the issuing, sale and redemption of state bonds for the purpose of improving the Idaho industrial training school at St. Anthony," approved March 13, 1911. [1911, ch. 77, p. 251.]

39. An act entitled, "An act providing for the issuing, sale and redemption of state bonds for the purpose of improving the Idaho soldiers' home," etc., approved March 13, 1911. [1911, ch. 79, p. 254.]

40. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$75,000 to the university of Idaho," etc., approved March 13, 1911. [1911, ch. 84, p. 315.]

41. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$25,000 for the construction of a wagon bridge across the Snake river near the city of Payette," etc., approved Feb. 1, 1911. [1911, ch. 87, p. 329.]

42. An act entitled, "An act authorizing the board of county commissioners of Lemhi county to submit question of incurring indebtedness for the construction of the Big Creek wagon road," etc., approved Feb. 16, 1911. [1911, ch. 104, p. 346.]

43. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$7500 for the construction of a wagon bridge across the Salmon river four miles below the Barr's bridge," etc., approved Feb. 17, 1911. [1911, ch. 105, p. 347.]

44. An act entitled, "An act providing for the issuance and sale of state bonds in the sum of \$15,000 for the construction of a wagon bridge across the Snake river near the Loveridge ferry," etc., approved Feb. 17, 1911. [1911, ch. 106, p. 352.]

45. An act entitled, "An act to provide for the macadamizing of about five miles of the public highway, along and adjoining the Oregon Short Line railroad, Bingham county, Idaho," etc., approved Feb. 18, 1911. [1911, ch. 108, p. 358.]

46. An act entitled, "An act providing for the issuance of state bonds in the sum of \$20,000 for the construction of a wagon road between the city of Boise and the Payette lakes," etc., approved Feb. 18, 1911. [1911, ch. 109, p. 362.]

47. An act entitled, "An act providing for the issuance of state bonds in the sum of \$9000 for the construction of a draw bridge across the St. Joe river at St. Maries," etc., approved Feb. 21, 1911. [1911, ch. 113, p. 368.]

48. An act entitled, "An act appropriating the sum of \$2671.16 for the purchase of the Heyburn toll wagon bridge across Snake river between Heyburn and Burley," etc., approved March 1, 1911. [1911, ch. 126, p. 413.]

49. An act entitled, "An act providing for the issuance of state bonds in the sum of \$25,000 for the construction of a wagon road between Kootenai

and Idaho-Montana state line near Cabinet," etc., approved March 3, 1911. [1911, ch. 134, p. 420.]

50. An act entitled, "An act providing for the issuance of state bonds in the sum of \$5000 for the construction of a wagon road between Leadore and a point on the northerly side of Lemhi river near the town of May," etc., approved March 3, 1911. [1911, ch. 138, p. 430.]

51. An act entitled, "An act to provide for the construction of roadbed on a public highway known as the Whitebird Dumacque and Grave Creek wagon road in Idaho county," etc., approved March 3, 1911. [1911, ch. 143, p. 438.]

52. An act entitled, "An act providing for the issuing of state bonds in the sum of \$10,000 for the construction of a wagon bridge across the Snake river, near Brownlee or Robinette," etc., approved March 3, 1911. [1911, ch. 144, p. 444.]

53. An act entitled, "An act authorizing the state board of land commissioners to sell certain state lands in Bingham county," etc., approved March 4, 1911. [1911, ch. 151, p. 455.]

54. An act entitled, "An act to provide for the completion of Paris-Franklin road in the counties of Bear Lake and Oneida," etc., approved March 4, 1911. [1911, ch. 153, p. 458.]

55. An act entitled, "An act providing for the issuance of state bonds in the sum of \$6000 for the construction of a wagon bridge across the Snake river between Twin Falls and Lincoln counties," etc., approved March 7, 1911. [1911, ch. 156, p. 476.]

56. An act entitled, "An act providing for the issuing of state bonds in the sum of \$5500 for the construction of a wagon bridge across the south fork of Snake river," etc., approved March 8, 1911. [1911, ch. 180, p. 582.]

57. An act entitled, "An act providing for the issuing of state bonds in the sum of \$6000 for the construction of a wagon bridge across the Snake river between the counties of Lincoln and Twin Falls," etc., approved March 9, 1911. [1911, ch. 202, p. 667.]

58. [Repealed by S.L. 1925, ch. 110.]

59. Saving clause in repeal of poll tax law. Approved Jan. 27, 1912. [1912, ch. 2, § 2, p. 6.]

60. An act concerning the dissolution of school districts traversed by county lines and boundaries, approved Feb. 11, 1913. [1913, ch. 9, p. 48.]

61. An act entitled, "An act authorizing the state board of land commissioners to sell certain state lands in Bingham county," etc., approved March 1, 1913. [1913, ch. 43, p. 146.]

62. An act entitled, "An act providing for the issuance of bonds in the sum of \$6000 for the construction of buildings to be erected in Lincoln county for experiment station," etc., approved March 1, 1913. [1913, ch. 44, p. 148.]

63. An act entitled, "An act providing for the issuance of state bonds in the sum of \$10,000 for the construction of buildings upon the Lava Hot Springs," etc., approved March 4, 1913. [1913, ch. 49, p. 155.]

64. An act entitled, "An act appropriating \$14,770.28 out of the Carey act trust fund for the reclamation of state lands within the Gem irrigation district in Owyhee county," etc., approved March 5, 1913. [1913, ch. 62, p. 296.]



65. An act entitled, "An act authorizing the state board of land commissioners to extend the time of payment due on all certificates of sale for state school lands in the year 1913 for five years," etc., approved March 8, 1913. [1913, ch. 78, p. 333.]

66. An act entitled, "An act authorizing the state treasurer to refund certain sums of money to widows," etc., approved March 8, 1913. [1913, ch. 79, p. 334.]

67. An act entitled, "An act providing for the issuance of state bonds for purchasing that portion of the interstate bridge over Snake river between Lewiston and Clarkston," etc., approved March 10, 1913. [1913, ch. 80, p. 334.]

68. An act entitled, "An act authorizing the use of moneys now in the public building endowment fund, by the capitol building commission," etc., approved March 10, 1913. [1913, ch. 104, p. 424.]

69. An act entitled, "An act authorizing the state land board to extend the time for payments for a period of ten years to purchasers of state lands," etc., approved March 11, 1913. [1913, ch. 131, p. 481.]

70. [Repealed by S.L. 1925, ch. 110.]

71. An act entitled, "An act providing for the completion of the macadamizing a public highway, along and adjoining the Oregon Short Line railroad in Bingham county," etc., approved March 10, 1913. [1913, ch. 139, p. 490.]

72. An act entitled, "An act to amend sections 2 and 15 of chapter 134 of the laws of 1911," etc. (the original act relating to a bond issue for a road in Bonner county), approved March 12, 1913. [1913, ch. 164, p. 532.]

73. An act entitled, "An act authorizing the board of trustees of the capitol building to sell the Central school building," etc., approved March 5, 1913. [1913, ch. 176, p. 552.]

74. An act entitled, "An act to provide for the issuance of state bonds in the sum of \$10,000 for the construction of a wagon road between the city of Boise and the state line between Idaho and Montana," etc., approved March 13, 1913. [1913, ch. 182, p. 580.]

75. An act entitled, "An act providing for the issuance of state bonds in the sum of \$200,000 for the payment of a portion of the cost for constructing a system of state highways in the state of Idaho," etc., approved March 13, 1913. [1913, ch. 183, p. 585.]

76. An act entitled, "An act providing for the issuing of state bonds for the purpose of purchasing 84 acres of land for the state to be used in connection with the state penitentiary," approved March 15, 1913. [1913, ch. 192, p. 635.]

77. An act entitled, "An act authorizing the state land board to extend the time for payment for a period of two years to purchasers of state lands," etc., approved Feb. 26, 1915. [1915, ch. 19, p. 70.]

78. An act entitled, "An act authorizing the state board of land commissioners to sell certain state lands situate in Clearwater county," etc., approved March 3, 1915. [1915, ch. 32, p. 102.]

78a. An act amending an act providing for the issuance of state bonds in the sum of \$200,000 for state highways, approved March 13, 1913 [500:17a (75)], amendatory act approved March 7, 1915. [1915, ch. 36, p. 115.]

79. An act entitled, "An act ratifying the action of the board of trustees of Oakley independent school district No. 2 in Cassia county in issuing certain warrants," etc., approved March 15, 1915. [1915, ch. 107, p. 249.]

80. An act entitled, "An act providing for the issuance of state bonds in the sum of \$1,000,000 for the payment of a portion of the cost of constructing a system of state highways in the state of Idaho," etc., approved March 20, 1917. [1917, ch. 64, p. 197.]

81. An act entitled, "An act changing the northern and western boundary lines of independent school district of Boise City," etc., approved March 20, 1917. [1917, ch. 77, p. 240.]

82. An act entitled, "An act to provide for the revision, compilation and codification of the laws of the state of Idaho," etc., approved March 20, 1917. [1917, ch. 78, p. 241.]

83. An act amending the charter of the city of Lewiston, approved March 12, 1917. [1917, ch. 87, p. 303.]

84. An act entitled, "An act to provide for the erection of a monument to the memory of Governor Frank Steunenberg," etc., approved March 20, 1917. [1917, ch. 94, p. 324.]

85. An act entitled, "An act conferring authority upon the electors residing within certain territory to vote at the general election in November, 1918, upon the question whether such described territory shall be detached from Bannock county and attached to Franklin county," etc., approved Feb. 8, 1917. [1917, ch. 96, p. 327.]

86. An act amending an act to provide for the establishment of graded public schools in the city of Lewiston, approved March 14, 1917. [1917, ch. 134, p. 444.]

87. An act entitled, "An act establishing an experimental and demonstration farm for the high altitude agricultural areas of the state of Idaho," etc., approved March 20, 1917. [1917, ch. 143, p. 458.]

88. An act entitled, "An act approving and confirming the purchase by the state board of land commissioners, in behalf of the state of Idaho of the irrigation system of the King's Hill irrigation and power company," approved March 13, 1917. [1917, ch. 160, p. 487.]

89. An act entitled, "An act to authorize the governor to convey the title in the King Hill project to the United States for reconstruction," etc., approved March 16, 1917. [1917, ch. 162, p. 492.]

#### STATUTORY NOTES

**Compiler's Notes.** — This section is analogous to R.C., § 17. It was reenacted and appeared in C.L. as § 500:17a; in C.S. as § 9458, and in I.C.A. as § 70-119.

Compiled Statutes of 1919 contained the following note: "Subdivision 78a was omitted from Compiled Laws through inadvertence, attention being called thereto in the commissioner's report. It was inserted by 1919, ch.

159, p. 518. Repeating what was said by Code Commissioner MacLane: 'This enumeration is made without any attempt on the part of the commissioner to determine how far these special or local acts are still in force, and they are continued in force only so far as they have not been superseded, repealed, amended or modified by subsequent legislation.'



## JUDICIAL DECISIONS

## ANALYSIS

Subdivision 3.  
 Subdivision 4.  
 Subdivision 21.  
 Subdivision 33.

**Subdivision 3.**

The state auditor is prohibited by the constitution from drawing his warrant upon any fund in payment of a claim until the proper legislative appropriation has been made. *Evans v. Huston*, 27 Idaho 559, 150 P. 14 (1915).

**Subdivision 4.**

The territorial legislature had authority to create and organize an independent school district and it was as fully an educational corporation as any other educational corporation within the state. *Howard v. Independent Sch. Dist. No. 1*, 17 Idaho 537, 106 P. 692 (1910).

**Subdivision 21.**

In the passage of an act to increase the public indebtedness, the legislature must be governed by the assessed value of the taxable property as it then exists, and cannot leave the ascertainment of future assessed valuations to the future acts of ministerial or executive officers. *Lewis v. Brady*, 17 Idaho 251, 104 P. 900, 28 L.R.A. (n.s.) 149 (1909).

**Subdivision 33.**

When an act embraces two distinct subjects, neither of which is properly connected with the other, the act is repugnant to the constitution and must fall. *State ex rel. Moore v. Banks*, 37 Idaho 27, 215 P. 468 (1923).

**73-120. Special and local laws of 1919.** — The following acts and parts of acts are the local and special statutes which were passed at the 1919 session of the legislature and which not being general laws, have not been incorporated in these codes.

1. An act entitled, "Conferring authority upon the electors residing within certain territory herein described to vote at the general election to be held in Nov. 1920, upon the question whether such described territory shall be detached from Idaho county and annexed to Valley county," approved Feb. 19, 1919. [1919, ch. 101, p. 366.]

2. An act entitled, "Reverting title to the state of Idaho of lots numbered one, two, three, four, six, seven, and eight of block numbered nine of Morehead's addition to the city of Weiser," approved March 1, 1919. [1919, ch. 113, p. 398.]

3. An act entitled, "Appropriating \$30,000 for the construction of improvements on the south fork of the Snake river in Jefferson and Madison counties," approved March 8, 1919. [1919, ch. 29, p. 106.]

4. An act entitled, "To provide for the improvements of the Lewiston state normal school," etc., approved March 8, 1919. [1919, ch. 28, p. 105.]

5. An act entitled, "To appropriate the sum of \$10,000 to build a steel bridge over the Kootenai river at Leonia," etc., approved March 11, 1919. [1919, ch. 40, p. 138.]

6. An act entitled, "Making an appropriation for the purchase of additional grounds for the Idaho technical institute," approved March 12, 1919. [1919, ch. 124, p. 410.]

7. An act entitled, "To approve and confirm the action of the state board of land commissioners of the state of Idaho, in extending the time for settlers to make final proof of reclamation," etc., approved March 12, 1919. [1919, ch. 132, p. 426.]

8. An act entitled, "To provide for completing the construction of the new capitol building at Boise, Idaho," etc., approved March 12, 1919. [1919, ch. 45, p. 143.]

9. An act entitled, "Providing for the issuance and sale of state bonds in the sum of \$200,000, appropriating the proceeds of the sale thereof for the payment of a portion of the cost of laying out, surveying and constructing a system of state highways," etc., approved March 13, 1919. [1919, ch. 49, p. 149.]

10. An act entitled, "Amending sections 2, 7, 9, and 12 of chapter 64 of the session laws of 1917, providing for the issuance and sale of state highway bonds," etc., approved March 13, 1919. [1919, ch. 50, p. 153.]

11. An act entitled, "Giving independent school and rural high school districts the power until September 1, 1919, to issue funding bonds," etc., approved March 14, 1919. [1919, ch. 55, p. 164.]

12. An act entitled, "To provide for the preparation and indexing for, and the printing and distribution of the Compiled Laws," etc., approved March 14, 1919. [1919, ch. 63, p. 197.]

13. An act entitled, "Authorizing the state treasurer to refund certain sums of money to widows," etc., approved March 14, 1919. [1919, ch. 66, p. 242.]

14. An act entitled, "For the construction of a state highway between the terminals of Star, Idaho, and McCall, Idaho," etc., approved March 14, 1919. [1919, ch. 59, p. 180.]

15. An act entitled, "Providing for the issuance and sale of state bonds in the sum of \$2,000,000, appropriating the proceeds of the sale thereof for the payment of a portion of the cost of laying out, surveying and constructing a system of state highways," etc., approved March 14, 1919. [1919, ch. 193, p. 578.]

16. An act entitled, "Creating a commission to decide upon a uniform style and design of memorial to be erected at each county seat in the state of Idaho," etc., approved March 15, 1919. [1919, ch. 67, p. 242.]

17. An act entitled, "To provide for the investigation and auditing of all accounts, books and records of each and every state office and state department of the state of Idaho," etc., approved March 17, 1919. [1919, ch. 82, p. 293.]

18. An act entitled, "Providing for the construction of a wagon road from a point near Neal, Elmore county, Idaho," etc., approved March 17, 1919. [1919, ch. 174, p. 548.]

19. An act entitled, "Appropriating the sum of \$119,456 out of the general fund of the state for the reclamation of state lands within the Gem Irrigation District in Owyhee county," etc., approved March 17, 1919. [1919, ch. 79, p. 285.]

20. An act entitled, "Appropriating the sum of \$25,000 for the purpose of helping defray expenses of drainage, widening, and cleaning the channel of the Spokane river at the outlet of Coeur d'Alene lake," etc., approved March 17, 1919. [1919, ch. 80, p. 287.]

21. An act entitled, "Providing for the improvement of Shoshone Falls Park," etc., approved March 17, 1919. [1919, ch. 189, p. 572.]



22. An act entitled, "Authorizing and directing the borrowing of \$3,000,000 by the state of Idaho for the purpose of paying outstanding claims," etc., approved March 18, 1919. [1919, ch. 94, p. 346.]

23. An act entitled, "Authorizing and directing the borrowing of \$1,800,000 by the state of Idaho, for the purpose of paying outstanding claims and accruing claims, charges and appropriations against the state highway fund," etc., approved March 18, 1919. [1919, ch. 95, p. 353.]

### STATUTORY NOTES

**Compiler's Notes.** — This section was compiled in C.S. as § 9459, and in I.C.A. as § 70-120.

**73-121. Certain documents to be in English.** — Any document, certificate or instrument required to be filed, recorded or endorsed by any officer of this state, or of any county, city or district in this state, shall be in the English language or shall be accompanied by a certified translation in English. [I.C., § 73-121, as added by 1986, ch. 282, § 1, p. 705.]

**73-122. Social security number.** — (1) The social security number of an applicant shall be recorded on any application for a professional, occupational or recreational license.

(2) The requirement that an applicant provide a social security number shall apply only to applicants who have been assigned a social security number.

(3) An applicant who has not been assigned a social security number shall:

- (a) Present written verification from the social security administration that the applicant has not been assigned a social security number; and
- (b) Submit a birth certificate, passport or other documentary evidence issued by an entity other than a state or the United States; and
- (c) Submit such proof as the department may require that the applicant is lawfully present in the United States. [I.C., § 73-122, as added by 1998, ch. 248, § 4, p. 809; am. 1999, ch. 334, § 2, p. 909.]

### STATUTORY NOTES

**Effective Dates.** — Section 3 of S.L. 1999, ch. 334 declared an emergency. Approved March 24, 1999.

## CHAPTER 2

### IDAHO CODE COMMISSION

#### SECTION.

73-201. Purpose of act.

73-202. Definition of terms.

73-203. Code commission created — Appointment of members.

73-204. Compensation and expense of com-

#### SECTION.

mission — Employment of assistance.

73-205. Powers and duties of commission.

73-206. Number of sets — Sale price.

73-207. Completion bonds.

## SECTION.

- 73-208. Examination and approval of compilations.  
73-209. Certificate of compilation — Proclamation by governor.  
73-210. Copyright.  
73-211. Sale by state.  
73-212. Delivery of printed sets.  
73-213. Tax levy on actions.

## SECTION.

- 73-214. Pledge of tax or fees.  
73-215. Code fund created.  
73-216. Issuance of treasury notes.  
73-217. Sale of treasury notes.  
73-218. Proceeds of sale, how handled.  
73-219. Appropriation.  
73-220. Exemptions from certain acts.  
73-221. Report required of commission.

**73-201. Purpose of act.** — The intent and purpose of this act is to keep current so far as practicable the compilation known as Idaho Code, by authorizing publication of pocket parts to the volumes of the Idaho Code, or as necessary, the republication of single or more volumes, or the addition of volumes, or by other devices designed and intended to maintain the Idaho Code up to date, and especially after each session of the legislature, indicating therein existing laws, repealed laws or parts of laws, substitute laws, additional laws, and constitutional provisions and changes, rules of the Supreme Court of Idaho, additional notes, annotations and indexing. This act shall be so interpreted as to grant the commission hereby created all power and authority necessary to accomplish such intent and purpose. [1949, ch. 167, § 1, p. 355; am. 1953, ch. 250, § 1, p. 398.]

## STATUTORY NOTES

**Compiler's Notes.** — The words "this act" refer to S.L. 1949, ch. 167, §§ 1-24, p. 355, as amended, compiled as §§ 73-201 — 73-221.

## JUDICIAL DECISIONS

**Cited in:** Kirk v. United States, 232 F.2d 763 (9th Cir. 1956); Golconda Lead Mines v. Neill, 82 Idaho 96, 350 P.2d 221 (1960).

**73-202. Definition of terms.** — "Code Commission" as used in this act shall be deemed to mean and refer to the code commission created by this act.

"Compilation" as used in this act shall be deemed to be the compilation known as the "Idaho Code" authorized and published pursuant to Session Laws of 1947, Chapter 224, and all pocket parts thereto and replacement or republication of all or any part thereof and contents, and new or additional volumes, compiled and published as in this act provided. [1949, ch. 167, § 2, p. 355; am. 1953, ch. 250, § 2, p. 398.]

## STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

**73-203. Code commission created — Appointment of members.** — A continuing code commission is hereby created in the office of the secretary of state, to be known as the "Code Commission," to consist of three (3)



persons, members of the Idaho state bar, who are actively engaged in the practice of law, not holders of any other compensated state office or position, whose residences are such that they may readily and conveniently meet from time to time as such commission. The "1947 Idaho Code Commission," created and appointed pursuant to chapter 224, of 1947 Session Laws of Idaho is hereby continued in office as the code commission created by this act; one (1) of such commissioners shall continue in office until the first day of December, 1950, one (1) until the first day of December, 1952, and one (1) until the first day of December, 1954; the term to be served by each present commissioner shall be determined by the members of the commission; not later than twenty (20) days after the effective date of this act the commission shall certify to the governor and to the secretary of state the name of each present commissioner and the term determined to be served by him. At the expiration of each of said terms and of the terms hereinafter provided, a member of the commission shall be appointed by the governor to serve for a term of six (6) years. The appointee shall be selected from a list of not more than three (3) qualified persons whose names shall be submitted to the governor by the board of commissioners of the Idaho state bar not less than fifteen (15) days prior to the expiration of a term of a commissioner. At its first meeting after the effective date of this act the commission shall organize by selecting one (1) of its members chairman, and shall thereafter reorganize in the same manner at its first meeting held after each appointment of a commissioner. The secretary of state shall serve as permanent secretary of the commission. Each commissioner shall serve until his successor has been appointed. In the event a vacancy occurs in the commission other than by expiration of a term the remaining members shall fill such vacancy by appointment of a qualified person. [1949, ch. 167, § 3, p. 355; am. 1974, ch. 5, § 8, p. 23.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

ch. 5 provided this act take effect on and after July 1, 1974.

**Effective Dates.** — Section 9 of S.L. 1974,

**73-204. Compensation and expense of commission — Employment of assistance.** — Each member of the commission shall receive as compensation for his services the sum of twenty-five dollars (\$25.00) for each day's attendance at a meeting and each day's performance of the duties of the commission and shall receive his actual and necessary expenses, incurred in performing his duties as such commission. Payment of said compensation shall not be considered salary as defined in section 59-1302(31), Idaho Code. The commission is hereby authorized to employ and fix the compensation of adequate legal, clerical and other assistance. [1949, ch. 167, § 4, p. 355; am. 1972, ch. 161, § 1, p. 360; am. 2003, ch. 56, § 1, p. 200.]

## STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 2003, January 1, 2003 and approved March 13, ch. 56 declared an emergency retroactively to 2003.

**73-205. Powers and duties of commission.** — The commission is hereby authorized, empowered and directed to enter into and execute contracts it may deem necessary and proper with any publishing company, with respect to general laws, repeals and amendments which may be enacted by each regular session of the legislature hereafter, and beginning with the thirtieth session, and with respect to bringing up to date annotations, notes and indexes of general law continuing in force, for the publication thereof, and publication of any other compilation within the purview of this act. The intent hereof is that as soon as practicable after each session of the legislature the Idaho Code be brought up to date. Similar contracts relating to and after one or more special sessions may be entered into and executed if the commission deems it necessary and desirable. Whenever one or more volumes of the Idaho Code becomes too bulky, or for other reason it appears to the commission to be necessary or desirable, the commission may contract for republication of such volume or volumes, or additional volumes. When the commission deems it necessary or advisable, it may, in its sole discretion, assist the Supreme Court of the state of Idaho in any preliminary work or studies necessary in the preparation of rules of said court and any proposed legislation which may from time to time be necessary to segregate substantive from procedural law, and may contract for the publication in replacement or additional volumes of such rules as may be made, prescribed and promulgated by said court.

The contracts shall appropriately describe specifications of the editing, content of compilation, printing, binding, size of type to be used in text and notes, grade and weight of paper to be used, style of page, provisions for insertion of new matters, with appropriate section numbers in existing or changed titles and chapters, and shall require in full new and amended laws, repeals of laws, or parts thereof, constitutional changes, new and additional annotations, notes and indexes, references and cross-references relating to the existing laws of this state and to decisions of the Supreme Court of the state of Idaho, Idaho Court of Appeals, Supreme Court of the United States and federal courts citing and construing the same, formal Idaho attorney general opinions since January 1, 1983, citing and construing the same, history of the law or section, and shall contain such other information and ancillaries as the commission may deem necessary and proper, or as the publishers may include with the consent of the commission. [1949, ch. 167, § 5, p. 355; am. 1953, ch. 250, § 3, p. 398; am. 1955, ch. 59, § 1, p. 116; am. 1987, ch. 114, § 1, p. 227.]

**73-206. Number of sets — Sale price.** — The contract shall require the publishing company to deliver, on or before such date as may be fixed by the commission, such number of sets of bound volumes and/or pocket parts of the compilation for use of the state of Idaho and its public agencies as may be determined by the board of examiners, at the price stated in the contract.



The publishing company shall receive payment upon approval of such compilation as hereinafter provided and delivery of the sets thereof f.o.b. Boise, Idaho, and such other places in Idaho designated by the secretary of state of Idaho. If the publishing company cannot make delivery on the date fixed in the contract because of conditions beyond its control and shall satisfy the commission to this effect, the commission may, but it is not required to, extend the date of delivery for a period by it deemed reasonable. The publishing company shall agree in the contract to cause to be made available on the market through an agent, resident in Idaho, a sufficient number of sets of the compilation to supply the demand therefor within the state of Idaho, at the price fixed in the contract. [1949, ch. 167, § 6, p. 355; am. 1977, ch. 232, § 6, p. 687; am. 1979, ch. 157, § 1, p. 477.]

**73-207. Completion bonds.** — The publishing company, coincident with its execution of any contract, shall furnish a performance and completion bond in terms and in a sum specified by the commission written in favor of and to be paid to the state of Idaho in the event of failure of the publishing company to comply with the terms and conditions of the contract. The premium or expense of the bond shall be paid out of the appropriations herein provided for. [1949, ch. 167, § 7, p. 355.]

**73-208. Examination and approval of compilations.** — The commission shall continue to supervise and give directions relating to the plan of titles, chapters and resectioning, annotations, cross-references, tables and indexes, form and uniformity of contents, and all other matters relating to compilations, deemed by the commission necessary and proper. The publishing company shall furnish galley and page proof to the commission relating to each compilation, which shall be examined under the commission's direction for the purpose of determining whether or not the compilation meets the requirements of section 73-205 of this act and the provisions of the contract relating to the compilation. [1949, ch. 167, § 8, p. 355.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

**73-209. Certificate of compilation — Proclamation by governor.** — Upon certificate of the commission filed with the secretary of state and the governor that any compilation (with the exception of the rules of the Supreme Court of the state of Idaho) has been completed, published and approved by the commission, the governor thereupon shall make a proclamation announcing its completion, and from and after the proclamation the compilation referred to in the proclamation shall be in force and effect and, together with the "Idaho Code" published pursuant to Session Laws of 1947, Chapter 224, shall be received in all courts and by all justices, judges, public officers, commissions and departments of the state government and all others as evidence of the general laws of Idaho then existing and in force and effect, and as an authorized compilation of the general statutes, codes, and

laws of Idaho and ancillaries thereto. [1949, ch. 167, § 9, p. 355; am. 1953, ch. 250, § 4, p. 398.]

#### STATUTORY NOTES

**Compiler's Notes.** — The words enclosed in parentheses so appeared in the law as enacted.

**73-210. Copyright.** — Copyright of all compilations shall be taken by and in the name of the publishing company which shall thereupon assign the same to the state of Idaho, and thereafter the same shall be owned by the state of Idaho. The commission is authorized and empowered to grant the use of the copyrights of the Idaho Code published pursuant to Session Laws of 1947, Chapter 224, and of all compilations authorized by this act, in connection with the performance of its said duties and obligations. [1949, ch. 167, § 10, p. 355.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

**73-211. Sale by state.** — The state of Idaho shall not sell any of the compilations purchased by it, but may at any time exchange the same with exchange libraries of other states and territories.

Bound volumes of the Idaho Code that have been replaced by republished volumes may be discarded or destroyed; pocket parts that have been superseded by more current issues may be discarded or destroyed. [1949, ch. 167, § 11, p. 355; am. 1977, ch. 232, § 7, p. 687.]

**73-212. Delivery of printed sets.** — Upon approval by the commission of any compilation and proclamation by the governor, the publishing company shall immediately deliver to the secretary of state of Idaho at Boise, Idaho, and such other places in Idaho designated by the secretary of state of Idaho, the number of sets of the compilation which the state of Idaho, through the state board of examiners, has determined to be necessary for its use. The secretary of state shall keep seventy-five (75) sets thereof for insertion in the sets of the Idaho Code reserved for the use of the members and officers of the legislature during times the legislature is in session, and distribute the remainder among such of the boards, institutions, officers and offices as shall be decided upon by the state board of examiners. Any remaining sets shall be kept by the secretary of state for subsequent sessions of the legislature, or be distributed as directed by the state board of examiners. The sets of all compilations, except those bound volumes which have been provided to members of the legislature under the provisions of section 67-909, Idaho Code, shall remain the property of the state of Idaho and be delivered by officers to their successors, and by legislators and legislative officers to the secretary of state, at the end of each session of the legislature so that the same may be used at subsequent sessions. [1949, ch.



167, § 12, p. 355; am. 1957, ch. 136, § 1, p. 229; am. 1977, ch. 232, § 8, p. 687; am. 1979, ch. 157, § 2, p. 477.]

### STATUTORY NOTES

**Effective Dates.** — Section 2 of S.L. 1957, ch. 136 declared an emergency. Approved March 7, 1957.      Section 3 of S.L. 1979, ch. 157 declared an emergency. Approved March 29, 1979.

**73-213. Tax levy on actions.** — There is hereby levied a fee of ten dollars (\$10.00) upon each civil action filed in the district court or in the magistrates' division of the district court including matters involving decedents' estates, whether testate or intestate, and including proceedings involving adoption and the appointment of a guardian of the person or of the estate or both. There is also hereby levied a fee of ten dollars (\$10.00) upon each party, except the plaintiff, making an appearance in any civil action in the district court or in the magistrates' division of the district court, except that no fee shall be levied or collected for an appearance in the small claims departments or for a proceeding under the summary administration of small estates act.

The clerks of the district courts and persons authorized by rule or administrative order of the supreme court are directed and required to remit all additional charges and fees authorized by this section and collected during a calendar month, to the state treasurer on or before the fifth day of the month following the calendar month of collection. The state treasurer shall place all such sums in the code fund for the following purposes:

1. From that portion of such sums pledged by section 73-214, Idaho Code, to pay the principal and interest on any treasury notes according to their priority issued under authority of this act. When any such treasury notes are issued and remain outstanding and unpaid and the state treasurer has sufficient moneys set aside as provided by section 73-214, Idaho Code, to pay the unpaid principal and interest of any treasury notes so issued and unpaid, the state treasurer, as soon as such notes may be paid by their terms, shall pay the same and shall certify such fact to the commission, and

2. To pay the cost of any compilations authorized under this act by the code commission, and

3. To pay the compensation and expenses of the code commission created by this act and its employees. [1949, ch. 167, § 13, p. 355; am. 1953, ch. 250, § 5, p. 398; am. 1961, ch. 191, § 1, p. 286; am. 1969, ch. 137, § 1, p. 423; am. 1972, ch. 161, § 2, p. 360; am. 1979, ch. 219, § 4, p. 607; am. 1992, ch. 225, § 1, p. 741.]

### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

**Effective Dates.** — Section 2 of S.L. 1992, ch. 255 provided that the act would become effective January 1, 1993.

Section 2 of S.L. 1969, ch. 137 provided that this amendment should be effective at 12:01 a.m. on January 11, 1971.

Section 7 of S.L. 1979, ch. 219 provided that the act should take effect July 1, 1979.

**73-214. Pledge of tax or fees.** — Whenever treasury notes are issued and sold as provided in this act, they shall constitute an irrevocable and irrepealable contract between the state of Idaho and the owner of said treasury notes that the portion of the taxes and/or fees pledged for payment thereof provided by this act shall not be reduced so long as any of the treasury notes issued under this act remain outstanding and unpaid, and that the state will cause said taxes or fees to be promptly collected, and sufficient thereof set aside and applied as in this act provided to pay the annual interest and an amount of principal that will be equal to the total amount of the notes issued and outstanding divided by the number of years over which said notes are to be paid, to provide for the payment of such treasury notes and interest according to the terms and priority of issues thereof, and that the legislature shall not reduce the amount of such pledged tax or fee while any of said treasury notes are outstanding; but if all thereof be paid the legislature may reduce such tax or fee to be collected and pledged for payment of any future or new or additional issue of notes sold under this act after such reduction. Any holder of said treasury notes, or any person, or officer, being a party in interest, may by action either at law or in equity enforce and compel the performance of the duties of any officer or person herein mentioned, required by this act. [1949, ch. 167, § 14, p. 335; am. 1953, ch. 250, § 6, p. 398; am. 1972, ch. 161, § 3, p. 360.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

**73-215. Code fund created.** — There is hereby created in the hands of the state treasurer a fund to be known as the "Code Fund." All funds in the hands of the state treasurer credited to the "Idaho Code Fund" are hereby transferred, appropriated to and made a part of the code fund, together with any and all moneys now or hereafter remitted to and received by the state treasurer for deposit in the code fund pursuant to section 73-213, Idaho Code. At the beginning of each fiscal year those moneys in the Idaho code fund that exceed the prior year's expenditures, excluding a transfer by appropriation, by twenty-five percent (25%) or more shall be transferred to the general fund. [1949, ch. 167, § 15, p. 355; am. 2002, ch. 19, § 1, p. 23.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201. ch. 19 provided that the act should take effect on and after July 1, 2002.

**Effective Dates.** — Section 3 of S.L. 2002,

**73-216. Issuance of treasury notes.** — The commission is hereby authorized to anticipate the proceeds of the collection of any or all of the taxes or fees provided for in this act, and when necessary is hereby authorized to cause to be issued "Code Fund Treasury Notes," bearing such rate of interest, not exceeding that provided by law, as the commission may determine, in such amounts which, together with the unencumbered or



unobligated moneys in the Code Fund, shall not exceed in the aggregate the sum of three hundred thousand dollars (\$300,000) to carry out the purposes of this act. Said treasury notes may be issued in serial form to mature at stated times not exceeding twenty (20) years from date of issuance, shall be signed by the chairman of the code commission, attested by the secretary thereof, shall be countersigned by the treasurer of the state of Idaho, and shall be in such form as approved by the attorney general. [1949, ch. 167, § 16, p. 355; am. 1953, ch. 250, § 7, p. 398; am. 1961, ch. 191, § 2, p. 286; am. 1972, ch. 161, § 4, p. 360.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

**73-217. Sale of treasury notes.** — The treasury notes shall be sold by the state treasurer to the highest bidder for cash at not less than par and accrued interest at such times and in such amounts as may be determined by the commission, after advertising the time and place of sale in such manner as the commission shall determine; provided, the treasury notes or any part thereof may be sold by the state treasurer at any time at private sale without advertisement, for not less than par and accrued interest. The state treasurer, with the approval of the commissioner of public investments and other officials whose approval is required by law for investment of public funds, may purchase for investment any or all the treasury notes at par and accrued interest. [1949, ch. 167, § 17, p. 355.]

**73-218. Proceeds of sale, how handled.** — The proceeds of the sale of the treasury notes shall be placed to the credit of the code fund in the state treasury, except such amount as may be required to be paid as accrued interest, which amount shall be credited to a special interest fund for payment of interest on the treasury notes. The expenses incurred by the state treasurer in the preparation and sale of the treasury notes shall be paid out of the code fund. The balance of such proceeds and all moneys now or hereafter in said code fund shall be used exclusively for the purposes authorized by this act, and shall be paid out of warrants drawn by the state controller supported by vouchers of the commission.

Whenever any treasury notes are hereafter issued and outstanding, pursuant to this act, the state treasurer shall set up and keep separate accounts for payment of the interest required to be paid on such treasury notes and to provide a sinking fund for the payment of such treasury notes. [1949, ch. 167, § 18, p. 355; am. 1953, ch. 250, § 8, p. 398; am. 1994, ch. 180, § 239, p. 420.]

#### STATUTORY NOTES

**Effective Dates.** — Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on and after the first Monday of January, 1995, if the state board of

canvassers has certified that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the state auditor to

state controller." Since such amendment was adopted, the amendment to this section by § 239 of S.L. 1994, ch. 180 became effective January 2, 1995.

**73-219. Appropriation.** — All funds, appropriations and other moneys now or hereafter appropriated or provided by law for the purposes and administration of the functions, powers and duties of the code commission created by chapter 167, Laws of 1949, including those funds and moneys of the code fund and the code redemption fund, shall be and the same hereby are, respectively, transferred to the code fund created by chapter 167, Laws of 1949, and made available to and placed under the control of said code commission, and all such moneys accruing to or received into said fund are hereby appropriated to said code commission for expenditure by it in the administration and carrying out of the duties and purposes required of the said commission under the provisions of this act and to pay the compensation and expenses of the commission and its employees. The state controller is hereby authorized and directed to cause the foregoing transfers to be made. All such moneys shall be paid out on warrants drawn by the state controller as in this act provided, supported by vouchers prepared and approved by the code commission certified by its chairman, and approved by the state board of examiners. [1949, ch. 167, § 19, p. 355; am. 1953, ch. 250, § 9, p. 398; am. 1955, ch. 59, § 2, p. 116; am. 1994, ch. 180, § 240, p. 420.]

#### STATUTORY NOTES

**Effective Dates.** — Section 241 of S.L. 1994, ch. 180 provided: "This act shall be in full force and effect on and after the first Monday of January, 1995, if the state board of canvassers has certified that an amendment to the Constitution of the State of Idaho has been adopted at the general election of 1994 to change the name of the state auditor to state controller." Since such amendment was adopted, the amendment to this section by § 239 of S.L. 1994, ch. 180 became effective January 2, 1995.

**73-220. Exemptions from certain acts.** — The appropriations made in this act are expressly exempted from the provisions of the Standard Appropriations Act of 1945, (chapter 36 of title 67) from the provisions of section 67-2007 and 67-2008, from the provisions of section 67-3509, and from the provisions of sections 67-3516 — 67-3523, Idaho Code. [1949, ch. 167, § 20, p. 355; am. 1953, ch. 250, § 10, p. 398.]

#### STATUTORY NOTES

**Compiler's Notes.** — For words "this act" see Compiler's notes, § 73-201.

The words enclosed in parentheses so appeared in the law as enacted.

**Effective Dates.** — Section 11 of S.L. 1953, ch. 250 declared an emergency. Approved March 18, 1953.

**73-221. Report required of commission.** — The commission shall, thirty (30) days prior to the time each regular session of the legislature shall convene, furnish to the governor and secretary of state a report of its proceedings, and an analysis of its financial requirements for the next ensuing year or biennium, and its recommendations. The commission shall



furnish additional copies of such report as may be required by either of said officers. [1949, ch. 167, § 21, p. 355; am. 1972, ch. 161, § 5, p. 360.]

### STATUTORY NOTES

**Compiler's Notes.** — Section 22 of S.L. 1949, ch. 167 read: "The provisions of this act are hereby declared separable, and if any section, clause or phrase hereof is declared unconstitutional or void, the validity of the remaining portions of this act shall not thereby be affected."

Section 23 of S.L. 1949, ch. 167 read: "All 1943 Idaho Code fund treasury notes issued and outstanding pursuant to Session Laws of 1943, Chapter 103, and all 1947 Idaho Code fund treasury notes issued or to be issued and outstanding pursuant to Session Laws of 1947, Chapter 224, are hereby expressly validated, legalized, and ratified, and no right, privilege or interest secured by or vested in

any holder of any such treasury note or notes shall in anywise be impaired or abrogated by reason by any provision of this act.

Session Laws of 1947, Chapter 224, and each of its provisions, where applicable, is hereby expressly continued in full force and effect to the end that each and every of the purposes and objects thereof may be fully and completely accomplished."

**Effective Dates.** — Section 24 of S.L. 1949, ch. 167 declared an emergency. Approved March 12, 1949.

Section 6 of S.L. 1972, ch. 161 provided the act should take effect on and after July 1, 1972.

## CHAPTER 3

### CONSTRUCTION OF FORMULA CLAUSES

#### SECTION.

73-301. Construction of formula clauses.

**73-301. Construction of formula clauses.** — Marital deduction formula clauses in wills executed prior to January 1, 1977, by persons who are residents of this state at the time of death shall be deemed to refer to the increased marital deduction allowed by the Internal Revenue Code of the United States, section 2056(c), as amended by the Tax Reform Act of 1976 (HR 10612). [I.C., § 73-301, as added by 1978, ch. 358, § 2, p. 942.]

### STATUTORY NOTES

**Legislative Intent.** — Section 1 of S.L. 1978, ch. 358 read: "It is the intention of the legislature to extend to residents of Idaho the advantage of the increased marital declaration permitted by the Tax Reform Act of 1976 by enacting a statute that will cause marital deduction formula clauses to refer to the increased deduction permitted by HR10612, Section 2002(d)(1) (B)(iv)."

**Federal References.** — The Internal Revenue Code § 2056(c) as amended by the Tax Reform Act of 1976, referred to in this section, is compiled as 26 U.S.C. § 2056(c).

**Effective Dates.** — Section 3 of S.L. 1978, ch. 358 declared an emergency and made the act effective retroactive to January 1, 1977 and thereafter. Approved March 29, 1978.

## CHAPTER 4

### FREE EXERCISE OF RELIGION PROTECTED

#### SECTION.

73-401. Definitions.

73-402. Free exercise of religion protected.

#### SECTION.

73-403. Applicability.

73-404. Severability.

**73-401. Definitions.** — As used in this chapter unless the context otherwise requires:

(1) “Demonstrates” means meets the burdens of going forward with evidence, and persuasion under the standard of clear and convincing evidence.

(2) “Exercise of religion” means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.

(3) “Government” includes this state and any agency or political subdivision of this state.

(4) “Political subdivision” includes any county, city, school district, taxing district, municipal corporation, or agency of a county, city, school district, or municipal corporation.

(5) “Substantially burden” means to inhibit or curtail religiously motivated practices. [I.C., § 73-401, as added by 2000, ch. 133, § 2, p. 352.]

#### STATUTORY NOTES

**Effective Dates.** — Section 1 of S.L. 2000, ch. 134 amended Section 3, ch. 133, to read: “This act shall be in full force and effect on

and after February 1, 2001”.

Section 3 of S.L. 2000, ch. 133 declared an emergency. Approved March 31, 2000.

#### JUDICIAL DECISIONS

##### **Retroactivity.**

Idaho Free Exercise of Religion Act, § 73-401 et seq., does not apply retroactively because the act has no language indicating that the Idaho legislature intended that it was to be retroactively applied to activity occurring before the act went into effect on February 1, 2001. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916 (9th Cir. 2004).

District court properly dismissed under Fed. R. Civ. P. 12(b)(6) a physician assistant’s

action against the Idaho state board of medicine and the Idaho state board of medicine board of professional discipline under the Idaho Free Exercise of Religion Act, § 73-401 et seq., where the district court correctly concluded that the act did not apply retroactively to the boards’ conduct in failing to reinstate the physician assistant’s license. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916 (9th Cir. 2004).

**73-402. Free exercise of religion protected.** — (1) Free exercise of religion is a fundamental right that applies in this state, even if laws, rules or other government actions are facially neutral.

(2) Except as provided in subsection (3) of this section, government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.

(3) Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both:

- (a) Essential to further a compelling governmental interest;
- (b) The least restrictive means of furthering that compelling governmental interest.

(4) A person whose religious exercise is burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. A party who prevails in any action to enforce this chapter against a government shall recover attorney’s fees and costs.



(5) In this section, the term “substantially burden” is intended solely to ensure that this chapter is not triggered by trivial, technical or de minimis infractions. [I.C., § 73-402, as added by 2000, ch. 133, § 2, p. 352.]

### STATUTORY NOTES

<p><b>Effective Dates.</b> — Section 1 of S.L. 2000, ch. 134 amended Section 3, ch. 133, to read: “This act shall be in full force and effect on</p>	<p>and after February 1, 2001”. Section 3 of S.L. 2000, ch. 133 declared an emergency. Approved March 31, 2000.</p>
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### JUDICIAL DECISIONS

<p><b>Inmate’s Rights.</b> Where corrections board had compelling interests in creating tobacco-free policy for prisons and its tobacco-free policy was the least restrictive means to further those inter-</p>	<p>ests, policy did not violate inmate’s exercise of religion under Idaho Free Exercise of Religion Act. <i>Roles v. Townsend</i>, 138 Idaho 412, 64 P.3d 338 (Ct. App. 2003), cert. denied, 540 U.S. 839, 124 S. Ct. 98, 157 L. Ed. 2d 71 (2003).</p>
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### RESEARCH REFERENCES

<p><b>A.L.R.</b> — What constitutes “hybrid rights” claim under Employment Div., Dep’t of Human Resources v. Smith, 494 U.S. 872, 110 S.</p>	<p>Ct. 1595, 108 L. Ed. 2d 876. 163 A.L.R. Fed. 493.</p>
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**73-403. Applicability.** — (1) This chapter applies to all state laws and local ordinances and the implementation of those laws and ordinances, whether statutory or otherwise, and whether enacted or adopted before, on or after the effective date of this chapter.

(2) State laws that are enacted or adopted on or after the effective date of this chapter are subject to this chapter unless the law explicitly excludes application by reference to this chapter.

(3) This chapter shall not be construed to authorize any government to burden any religious belief. [I.C., § 73-403, as added by 2000, ch. 133, § 2, p. 352.]

### STATUTORY NOTES

<p><b>Effective Dates.</b> — Section 1 of S.L. 2000, ch. 134 amended Section 3, ch. 133, to read: “This act shall be in full force and effect on</p>	<p>and after February 1, 2001”. Section 3 of S.L. 2000, ch. 133 declared an emergency. Approved March 31, 2000.</p>
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**73-404. Severability.** — If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application and to this end the provisions of this act are severable. [I.C., § 73-404, as added by 2000, ch. 133, § 2, p. 352.]

### STATUTORY NOTES

<p><b>Effective Dates.</b> — Section 1 of S.L. 2000, ch. 134 amended Section 3, ch. 133, to read: “This act shall be in full force and effect on</p>	<p>and after February 1, 2001”. Section 3 of S.L. 2000, ch. 133 declared an emergency. Approved March 31, 2000.</p>
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